Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, *Petitioner*,

v.

SECRETARY OF THE NAVY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 20, 1994

138 pp

QUESTIONS PRESENTED

1. In *Sullivan v. Finkelstein*, 496 U.S. 617, 623 n.3 (1990), the Court left open the question whether, where a district court remands a case to a federal agency, the person seeking relief *may* appeal on the ground that the court should have granted broader relief. This case presents that question in extreme form: *must* an appeal be taken at the time such a decision is rendered? Does a failure to do so forfeit the right to appellate review of such a decision when, after the completion of agency proceedings on remand, the district court enters final judgment?

2. Did the Court of Appeals abdicate its responsibility under *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951), and the APA's requirement for substantial evidence review based on the "whole record" when it sustained a decision of the Board for Correction of Naval Records that failed to account in any way for evidence that detracted materially from the board's conclusion?

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In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, *Petitioner*,

v.

SECRETARY OF THE NAVY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Victoria M. Voge, a commander in the Navy Medical Corps, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

The case is "certworthy" because, contrary to the holdings of other circuits, the decision below proceeds on the premise that a partial denial of summary judgment coupled with a remand to an administrative agency is immediately appealable. The case thus presents the issue left unresolved in *Sullivan v. Finkelstein*, 496 U.S. 617, 623 n.3 (1990). To make matters worse, the Court of Appeals appears to have taken the view that such a decision *must* be appealed immediately.

In addition, certiorari is warranted because the Court of Appeals disregarded the settled rule that an agency must consider all of the evidence, and not only that which supports the agency's view.

Opinions Below

The Court of Appeals' unpublished *per curiam* affirmance is reproduced in the Appendix ("App.") at 1. Its order denying rehearing and declining rehearing *en banc* is at App. 6. The proceedings, unpublished orders and judgment of the District Court for the Eastern District of Court of Virginia are at App. 7, 9, 31 and 32.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on September 2, 1994. A timely petition for rehearing was denied on September 26, 1994.

Statutory and Regulatory Provisions

Section 1291 of the Judicial Code provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

Section 10(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1988), provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
> . . .
>
> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The military records correction statute, 10 U.S.C. § 1552(a)(1) (Supp. IV 1992), provides in pertinent part:

> The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2) such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department .
> . . .

The Navy's *Fair Hearing Plan* for health care professionals—Bureau of Medicine and Surgery Instruction 6320.62, ¶ 14-11 (May 29, 1981)—is reproduced at App. 106.

Statement of the Case

In 1982, while stationed on Guam, Dr. Voge was diagnosed as paranoid by another Navy doctor. This led to her medical evacuation to San Diego, where she was

examined at some length and found fit for full duty. She was subjected to a variety of other adverse actions, including the loss of her hospital credentials, the submission of highly critical fitness reports (with resulting failure of promotion) and the loss of $30,000 in statutory Additional Special Pay ("ASP").

After exhausting intraservice remedies, Dr. Voge sought relief from the Board for Correction of Naval Records ("BCNR") under 10 U.S.C. § 1552. She maintained that she had been transferred to Guam in the first place in retaliation for positions she had taken while assigned to the Naval Safety Center in Norfolk; that the original paranoia diagnosis was the result of command-influence; that that diagnosis was incorrect; and that the Navy had violated key procedural rights afforded by its *Fair Hearing Plan*, a binding agency regulation for the protection of Navy medical personnel. Those rights include, among others, the right to attend key meetings of the decision making body and the right to impartial board members.

In a 1986 decision, the BCNR removed from Dr. Voge's record one fitness report and parts of another, but left references to her loss of credentials, all of one adverse fitness report and most of another, her passover for promotion to captain and both the Guam and San Diego psychiatric records. App. 37. The BCNR reasoned:

> The Board finds that the psychiatric evaluations and medical board report were properly entered in Petitioner's naval record. The Board notes that Petitioner was aware of each medical report at the time made and chose to rebut the medical board report. App. 49-50.

Dr. Voge sued in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1988), for the lost

ASP and for corrections to her naval record. That court entered judgment for her on the pay issue in light of a government concession that it had been improperly withheld and dismissed the record-correction portions of the case. *Voge v. United States*, 11 Cl. Ct. 510 (1987). The Federal Circuit affirmed the money judgment but vacated the rest of the Claims Court's order. 844 F.2d 776 (Fed. Cir.), *cert. denied*, 488 U.S. 941 (1988).

Since the Tucker Act litigation had not resolved her record-correction cause of action, Dr. Voge sued the Secretary of the Navy under the APA in the District Court for the Eastern District of Virginia. In 1990, Judge Bryan denied both her motion for summary judgment on the *Fair Hearing Plan* claim and the Secretary's motion to dismiss or, in the alternative, for summary judgment, but remanded the case with instructions that the BCNR reconsider Dr. Voge's claim that her paranoia diagnosis was the result of command influence. App. 7-8.

On remand, the BCNR wrote to the officer who had given the paranoia diagnosis, but received no response. It obtained a statement from that officer's supervisor, who predictably denied all wrongdoing. Meanwhile, Dr. Voge obtained and submitted to the BCNR a letter from the officer who had given the paranoia diagnosis. In that letter, the officer denied that his diagnosis was the result of command influence, but cast doubt on the accuracy of his diagnosis, stating that in hindsight he should not have diagnosed her as paranoid. The BCNR denied relief. App. 53.

In light of the diagnosing officer's unanticipated change of position and in an effort to prove that she did not suffer from any mental illness, Dr. Voge consulted two distinguished independent experts: Raymond M. Costello, Ph.D., a professor in the Department of Psychiatry at the University of Texas Health Science Center, App. 70-93, and Terence F. McGuire, M.D., a board-certified psychiatrist

and examiner for the American Board of Psychiatry and Neurology. App. 94-105. Dr. McGuire was an Air Force flight surgeon for 23 years and NASA's consultant in psychiatry for over 30 years.

Drs. McGuire and Costello met separately with and interviewed Dr. Voge. Each subjected her to a requisite battery of diagnostic tests. After considering the results of the tests, both severely criticized the Navy's paranoia diagnosis. Both found that Dr. Voge was not and never had been paranoid. App. 90, 104. They faulted the Navy for failing to investigate the underlying question of whether Dr. Voge in fact had been intentionally misdiagnosed as a result of her stand at Norfolk with regard to Navy pilots' drug and alcohol abuse. According to Dr. Costello,

> [e]very one started with the premise that Voge was disturbed, that Voge was producing occupational turmoil, and that Voge required psychiatric labeling and fixing. *Not one, however, could locate her alleged personality disorder except in extraclinical data, that is in the complaints registered against her by Naval command.* App. 91 (emphasis added).

Dr. Costello referred with evident approval to the observation of a professor of psychiatry and psychology at Temple University, who had also examined Dr. Voge, that she was "singularly one of the most psychologically healthy individuals [he] ever met." App. 85.

After reviewing a complete set of Dr. Voge's psychiatric reports, Dr. McGuire noted:

> In all the USN reports I have read, I am struck by the apparent failure of the examiners openly to consider whether there could be real substance to Dr. Voge's sense of victim-

ization at the hands of a vindictive and powerful few. In my long experience with military, government, industrial and academic settings, I have seen such odious scenarios in action. The possibility of such a script in Dr. Voge's case cannot be dismissed out of hand by any conscientious investigator . . . yet it is not even mentioned by her military evaluators. Why did she apparently function so well before her controversial assignment to the Naval Safety Center and yet so poorly in the subsequent punitive assignment to Guam where she was labeled a personality disorder? . . . App. 99.

Dr. Voge's pre-military and early milit[a]ry record strongly suggest superior performance rather than functional impairment. By her report, she was more closed and less insightful prior to her assignment from NSC to Guam, but there is nothing available historically to suggest she would have been seen as pathologic. *Nor do any of the Navy evaluations I have seen document the pervasive long-term pathology necessary to make a personality disorder diagnosis.* I have checked with contacts at the USAF School of Aerospace Medicine, where Dr. Voge is currently on detached duty; she is reported to be functioning quite well on both occupational and interpersonal levels. Why would she now be functioning quite credibly, without evidence of those life-long "enduring patterns" mentioned above? App. 100 (emphasis in original).

Dr. McGuire found no warrant for a paranoia diagnosis, and a basis for only a "history of a probable past major depressive episode [resulting from her transfer to Guam] which went untreated and which is now resolved." *Id.* 104. Both of these experts concluded that Dr. Voge did not suffer from any personality disorders. App. 89-90, 104.

Dr. Voge submitted these reports to the BCNR, but the board totally disregarded them in its reconsideration on remand from the District Court. App. 56. Instead, it relied upon a Navy consulting psychiatrist, Captain John M. Mateczun, who never met with Dr. Voge but merely reviewed reports furnished to him. App. 59. He never considered the reports of Drs. McGuire and Costello because the BCNR failed to send him copies. After considering Captain Mateczun's report, Dr. Costello noted:

> No one asked to review documents from the [Naval Safety Center], to talk with her superiors or peers about her when she was assigned [there] or, in any other way, to open up the context within which she became a problem to the Navy rather than a prized asset. How is this oversight, not by one, but by every psychiatrist who was duty-bound to act as a physician in relationship to his patient, to be explained? Every psychiatrist, entrusted with her as a responsibility, apparently considered his client to be the U.S. Navy and not this human being. . . . App. 92.

Nonetheless, the BCNR adhered to its earlier refusal to order the Guam and San Diego evaluations removed from Dr. Voge's service record:

> After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion from [the Military Personnel Evaluations Branch of the Naval Military Personnel Command] and the memorandum from the Specialty Advisor for Psychiatry [Captain Mateczun]. . . . App. 57.

In reaching this conclusion, the BCNR never conducted an evidentiary hearing. What is more, neither it nor its consultant ever addressed the evidence from Drs. Costello and McGuire.

When Dr. Voge returned to the District Court, Judge Bryan ruled that the BCNR had properly reviewed her case in conducting the remand and that its action was neither arbitrary nor capricious. App. 32. He did not address her claim that the Navy had violated its *Fair Hearing Plan*. *Id. passim*.

Dr. Voge timely appealed Judge Bryan's final order to the Fourth Circuit, and in a timely amended notice of appeal, specifically identified his 1990 Order as one of the two orders being appealed. App. 112. Her briefs to the Court of Appeals raised several issues addressing the validity of the BCNR's action on the remand and the district court's affirmance of the BCNR's decision. She also briefed the Navy's violation of its *Fair Hearing Plan*.

The Secretary did not attempt to defend the violation. Instead, without citing any authority, he asserted in a footnote that

> [m]any of the claims raised in appellant's brief address the latter three psychiatrist's [*sic*] attack on the accuracy of the 1982 Tinelli evaluation in addition to several other issues that were addressed and denied by Judge Bryan's order in 1990, and by his refusal to address those issues at the October 1993 hearing. Since those issues were not specified in the remand order, this court should similarly decline to address those issues. Respondent's 4th Cir. Br. 13 n.9.

Dr. Voge's reply brief drew the Court of Appeals' attention not only to *Sullivan v. Finkelstein*, but also to *Silver v. Secretary of the Army*, 554 F.2d 664, 665 (5th Cir. 1977) (per curiam), and *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297-98 (1st Cir. 1972). The latter two cases hold that remands to a BCMR are not appealable. She explained that because Judge Bryan's 1990 decision was a remand, his ruling on the *Fair Hearing Plan* issue had been unappealable at that time. That issue could only be appealed following the 1993 decision which resolved the balance of her case and constituted the first and only final judgment.

The Fourth Circuit (Niemeyer, Williams and Erwin, *JJ.*) affirmed in a *per curiam* opinion which focuses on Dr. Voge's contention that the paranoia diagnosis was the result of command influence, App. 2-3, but is entirely silent with respect to the *Fair Hearing Plan*. It also never addresses the fact that the BCNR and the consultant whose report it adopted lock-stock-and-barrel had simply ignored the reports of Drs. Costello and McGuire. The court stated that "[t]he record evidences that Navy doctors observed a pattern of behavior which in their professional judgment clinically warranted referring Voge to a psychiatrist in 1982," App. 4, and concluded that the BCNR's decision was

not arbitrary and capricious. App. 5.

Dr. Voge sought rehearing and rehearing *en banc* because—there being no other explanation—it appeared that the panel had embraced the Secretary's position that the *Fair Hearing Plan* issue need not be considered and because the panel had overlooked the BCNR's failure to take any account of critical evidence from Drs. Costello and McGuire. Rehearing was denied without explanation. App. 6.

Reasons for Granting the Writ

I

THE DECISION OF THE COURT OF APPEALS RESTS ON THE NOTION THAT A REMAND TO A FEDERAL AGENCY IS IMMEDIATELY APPEALABLE, CONTRARY TO THE RULINGS OF OTHER CIRCUITS

Certiorari should be granted because the decision below is in conflict with rulings of the First and Fifth Circuits, both of which have correctly held that a remand to a military record correction board is not appealable. *Silver v. Secretary of the Army*, 554 F.2d 664, 665 (5th Cir. 1977) (per curiam); *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297-98 (1st Cir. 1972). The Fourth Circuit, in contrast, apparently proceeded on the premise that such remands are immediately appealable. It refused to review the portion of Judge Bryan's 1990 decision that rejected Dr. Voge's claim under *Service v. Dulles*, 354 U.S. 363 (1957), that the Navy violated its own *Fair Hearing Plan* regulations in decredentialing her on Guam. This was the analysis proffered by the Secretary in the Fourth Circuit, and nothing in that court's decision suggests that some other analysis drove the outcome on the *Service v. Dulles* issue.

The Secretary ignored the *Fair Hearing Plan* issue on appeal, mistakenly claiming that the only matter before the Court was the correctness of Judge Bryan's 1993 order. *See* p. 10 *supra*. That Judge Bryan ruled on the *Fair Hearing Plan* issue in 1990 but not in 1993 is irrelevant to whether that issue was before the Court of Appeals. Dr. Voge properly appealed both rulings in a timely manner following the 1993 decision which resolved the balance of her case and which constituted the first and only final judgment. To hold otherwise would permit an interlocutory order to elude appellate review entirely, contrary to 28 U.S.C. § 1291. If this is what the Circuit Court intended (and there is no other explanation in the *per curiam*), its decision would, to say the least, dramatically alter the appellate landscape. It would also do so in the most unfair fashion, since Dr. Voge's right to appellate review would have been materially truncated without prior notice.

Pauls and *Silver* merely illustrate the larger principle that ordinarily remands to federal agencies are not appealable. *E.g., Travis v. Sullivan*, 985 F.2d 919, 920 (7th Cir. 1993) (citing *Crowder v. Sullivan*, 897 F.2d 252 (7th Cir. 1990) (*per curiam*), and *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989)); *St. Francis Medical Center v. Sullivan*, 962 F.2d 1110, 1113 (3d Cir. 1992). The courts of appeals may only review final decisions of district courts. 28 U.S.C. § 1291. Remands "may be treated as final orders *if so designated by Congress*," 9 *Moore's Federal Practice* ¶ 110.08[1], at 13 & n.31 (Supp. 1993-94) (emphasis added). Congress has not designated remands to the correction boards as final orders. Because BCNR decisions are reviewable as garden variety federal questions, 28 U.S.C. § 1331 (1988), the general rule that remands to agencies are nonfinal applied to Judge Bryan's 1990 order.

The Court of Appeals thus applied a rule of law which is materially different from that which is generally

recognized by either this Court or other circuits: neither remands nor denials of summary judgment are final appealable decisions. *E.g., Sullivan v. Finkelstein*, 496 U.S. 617 (1990); *American Hawaii Cruises v. Skinner*, 893 F.2d 1400 (D.C. Cir. 1990); *Stewart v. Baldwin County*; 908 F.2d 1499 (11th Cir. 1990); *Vitreous Steel Co. v. Miller*, 911 F.2d 1223, 1230 n.3 (7th Cir. 1990); *Domegan v. Fair*, 859 F.2d 1059 (1st Cir. 1988); *Hepperle v. Southern Methodist University*, 526 F.2d 1257 (5th Cir. 1976).

In *Finkelstein*, the Court noted but disclaimed any view on the question whether, where a district court remands a case to a federal agency, the person seeking relief *may* appeal on the ground that the court should have granted broader relief. 496 U.S. at 623 n.3, *citing Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967) (Blackmun, J.), *cert. denied*, 390 U.S. 964 (1968). The instant case presents that question in extreme form: *must* an appeal be taken at the time such a decision is rendered? Does a failure to do so forfeit the right to appellate review of such a decision when, after the completion of agency proceedings on remand, the district court enters final judgment? The Court of Appeals' decision, silent as it is on the *Fair Hearing Plan* issue, indicates that it deemed that issue not properly before it. Unless *Silver*, *Pauls*, *Bohm* and the myriad other cases to the same effect were wrongly decided, the Court of Appeals erred.

The conflict implicit in the Fourth Circuit's action is not one that may be overlooked or put off to await further consideration by other courts of appeals. The legal issue is a fundamental one and numerous cases are potentially affected. The armed forces' correction boards handle thousands of cases each year. They generate a regular flow of judicial review proceedings under the APA, in addition to Tucker Act litigation. Remands are not uncommon in this kind of litigation, and it is important that the courts of appeals as well as the district courts and litigants be aware

of the appellate consequences of a remand. If the rule is, as the decision below implies, that a failure to appeal a decision which affirms the agency in part and remands in part works a forfeiture of the right to appellate review of the partial affirmance, that should be made clear. In addition, if that is to be the rule, it should not be applied retroactively.

Finally, a rule that effectively compels members of the service to appeal decisions such as Judge Bryan's 1990 order at once not only clutters up the courts of appeals with cases that may well be resolved in the remanded agency proceedings, but works a special hardship on military personnel who often can ill afford to litigate at all, much less to incur the expense of both an appeal and simultaneous reopened proceedings at the agency.

Because the first issue presented is particularly lopsided and the proper outcome clear, the Court may wish to dispense with full briefing and argument and direct the Court of Appeals to address Dr. Voge's *Service v. Dulles* issue. S. Ct. R. 16.1.

II

BY UPHOLDING AGENCY ACTION THAT FAILED TO ACCOUNT FOR SUBSTANTIAL CONTRARY EVIDENCE, THE COURT OF APPEALS DISREGARDED *UNIVERSAL CAMERA*

The case also warrants review because the Court of Appeals failed to insist that the BCNR render a rational account of the *entire* record, and not merely those parts of it that it thought supported the decision reached. This is contrary to *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

The Court of Appeals' departure from this basic rule of administrative law was particularly transparent: the

BCNR merely adopted the report of the Navy's psychiatry consultant without ever furnishing that consultant two key pieces of evidence: the reports of Drs. Costello and McGuire. Nor did the BCNR itself ever explain how it had taken those reports into account. Such a decision is arbitrary and capricious and should have been set aside. Where an agency simply brushes inconveniently contradictory evidence under the rug, it thwarts the right to reasoned agency action and meaningful judicial review. The failure of the District Court and the Court of Appeals to insist that the BCNR explain in any way how it had reconciled its decision with the powerful reports of Drs. Costello and McGuire was a major abdication.

As Judge Sentelle recently observed, a reviewing court must take into account any part of the record which fairly detracts from the weight of the evidence cited by the agency to support its conclusions. An appellate court must not merely "rubber stamp" an agency decision. *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 651 (D.C. Cir 1994). Here, there is strong reason to believe that precisely this has occurred. The BCNR relied solely on Captain Mateczun's file-folder review, but never furnished him the reports of Drs. McGuire and Costello and never addressed those reports itself. Neither the BCNR nor Captain Mateczun responded to those reports or explained why they did not warrant a different outcome. This is not reasoned agency action. An agency is not at liberty to literally ignore relevant and competent evidence. *E.g., Stephens v. United States*, 174 Ct. Cl. 365, 373, 358 F.2d 951, 955 (1966). When an agency disregards evidence of record, however, the reviewing court has a duty to act.

The issue is an important one and, regrettably, this is not an isolated case. An incorrect psychiatric diagnosis can have a pernicious and devastating effect on the individual. "Both for state licensure purposes and for employment purposes, a past diagnosis of personality disorder is poison-

ous." App. 105. This is particularly true of a paranoia diagnosis, since the very act of objecting to it can be viewed as confirmation. A person who (being in the military) has no right to refuse a psychiatric evaluation and who is subjected to an incorrect, stigmatizing psychiatric diagnosis which is likely to have lifelong adverse career and personal consequences has an unusually compelling claim to both reasoned agency action and meaningful APA review. While it obviously was not for the District Court or the Court of Appeals merely to substitute their judgment for that of the BCNR, they did have a duty to insist that the BCNR take into account *all* of the evidence presented to it and explain its ruling in light of and with reference to that evidence. The purpose of this, of course, is both to facilitate intelligent judicial review but also to furnish the citizen with the assurance to which she is entitled that her claim and her evidence have been properly considered. Those purposes were not served in this case.

A judicial determination that an agency's decision is supported by substantial evidence is premature until the agency considers all of the evidence and explains how that evidence relates to its conclusion. Allowing an appellate court to review an agency's decision when the agency has not considered all of the evidence which supports or detracts from its decision is as impermissible an intrusion on the agency's authority as would be judicial review prior to the exhaustion of administrative remedies.

* * *

The bedrock principles of judicial review and administrative law at issue in this case apply to judicial review of decisions of agencies as obscure as the record correction boards just as clearly as they do to judicial review of decisions of such better known agencies as the Nuclear Regulatory Commission, Interstate Commerce

Commission and Federal Communications Commission. Those principles are greatly eroded by the approach adopted by the Fourth Circuit.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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DECEMBER 20, 1994

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VICTORIA M. VOGE, Commander,
Medical Corps, U.S. Navy,
Plaintiff-Appellant,

v. No. 93-2346

SECRETARY OF THE NAVY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-89-1441-A)

Argued: May 10, 1994

Decided: September 2, 1994

Before NIEMEYER and WILLIAMS, Circuit Judges, and
ERWIN, Senior United States District Judge for the
Middle District of North Carolina,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Eugene Roy Fidell, FELDESMAN, TUCKER, LEIFER, FIDELL & BANK, Washington, D.C., for Appellant. Lt. Karen M. Gibbs Ernst, General Litigation Division, OFFICE OF THE JUDGE ADVOCATE GENERAL,

Alexandria, Virginia, for Appellee. ON BRIEF: Jeffrey E. Rummel, FELDESMAN, TUCKER, LEIFER, FIDELL & BANK, Washington, D.C., for Appellant. Helen F. Fahey, United States Attorney, Dennis E. Szybala, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant Voge, an active duty officer in the United States Navy Medical Corps, filed suit against the Navy requesting the court to set aside the decision of the Board for Correction of Naval Records (BCNR) and to expunge a psychiatric evaluation, documentation affecting her hospital credentials, and contested Officer Fitness Reports from her military records.

On January 12, 1990, Judge Bryan denied both the Government's motion to dismiss and its motion for summary judgment and remanded one factual issue to the BCNR for reconsideration and re-examination. The factual issue, alleged in a letter written by Appellant dated May 24, 1985, is whether Lieutenant Commander Eugene T. Tinelli, the Navy physician who gave Voge a psychiatric diagnosis in 1982, was ordered to do so by his military superior, Captain Charner W. Bramlett, and whether Bramlett was commanded to obtain Voge's psychiatric evaluation.

On October 13, 1993, the court reviewed the decisions rendered by the BCNR and denied the requested relief. Specifically, the court found that the BCNR properly reviewed Voge's allegations and that the BCNR did not act arbitrarily or capriciously in denying Voge the relief she requested. Voge now contends that the court erred in this

finding and seeks a reversal from the court order.

I

The court's grant of summary judgment is subject to de novo review. *Baber v. Hospital Corp. of America*, 977 F.2d 872, 874 (4th Cir. 1992). The BCNR's denial of relief is a final agency action and is reviewable under the Administrative Procedures Act. The proper standard of review under the Administrative Procedures Act is whether the decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See 5* U.S.C. § 706(2)(A)(1988). Under this standard, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 307 (4th Cir. 1990) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *see also Aquino v. Stone*, 957 F.2d 139 (4th Cir. 1992).

"[I]t is not the role of the courts to second-guess an agency's decision, absent a clear error of judgment . . . ." *Aquino*, 957 F.2d at 144. The question on appeal is whether the trial court properly held that the decision of the BCNR was not arbitrary, capricious, or unsupported by substantial evidence and that the decision complied with its January 1990 order to review and resolve the issues raised in Appellant's letter dated May 24, 1985.

II

Bramlett, Voge's commanding officer in Guam, evaluated her and, based upon her behavior, decided to refer her for psychiatric evaluation. The administrative record shows that Voge's professional judgment was questionable as evidenced by the course of treatment she

provided to numerous patients. The cumulative evidence concerning Voge's behavior served as legitimate indicia of a possible psychiatric problem.

Upon remand, the BCNR attempted to contact Tinelli and Bramlett for responses to Voge's allegations in her May 24, 1985 letter, in which she alleged that Tinelli told her that he and Bramlett had been ordered to give her a psychiatric diagnosis. Although Tinelli did not respond directly to the BCNR, Voge later submitted to the BCNR the letter he wrote to her counsel. Both Tinelli and Bramlett empathetically denied in writing that they had been ordered to refer Voge for psychiatric evaluation or to give her psychiatric diagnosis.

Bramlett wrote: "[T]here is no truth what-so-ever that I, or anyone else asked, suggested, hinted at, or ordered LCDR Tinelli to make any diagnosis of any sort on CDR Voge." (J.A. 363.) Tinelli, in a letter to Voge's attorney which was later submitted to the BCNR, stated that the allegation that the commanding officer ordered him to do a psychiatric evaluation of her was untrue. (J.A. 380.) These strong denials lead the BCNR to conclude that there was no need for further inquiry.

III

Voge makes numerous claims of having been mistreated due to command influence. Her assertion that she arrived in Guam labeled as a troublemaker and a non-team player is unsupported by evidence in the record.

The record evidences that Navy doctors observed a pattern of behavior which in their professional judgment clinically warranted referring Voge to a psychiatrist in 1982. The referring Navy physicians, Tinelli and Bramlett, emphatically denied Voge's allegations that they were ordered to have her evaluated.

After careful consideration of the evidence in the record, we conclude that the BCNR's decision was not arbitrary and capricious. The district court judgment is therefore affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED September 26, 1994

No. 93-2346
CA-89-1441-A

VICTORIA M. VOGE, Commander,
Medical Corps, U.S. Navy
Plaintiff-Appellant

v.

SECRETARY OF THE NAVY
Defendant-Appellee

On Petition for Rehearing with
Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTORIA M. VOGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 89-1441-A
SECRETARY OF THE NAVY,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated from the bench, the court concludes that the failure of the Board for Correction of Naval Records (BCNR), in its decision of February 4, 1986, to address and resolve the issues raised by the plaintiff's May 24, 1985 statement (R. 219), that the April 12, 1982 report of Eugene T. Tinelli, LCDR MC USN (R. 216), was prepared because he was ordered to do so by the Commanding Officer, Captain Bramlett, and by BUMED, renders the decision of that board, insofar as it failed to remove the said report of Tinelli from the plaintiff's record and consider its adverse effect on plaintiff's requested relief, unsupported by substantial evidence. Accordingly, it is hereby ORDERED that:

1. This action is remanded to the Secretary of the Navy with directions that it be further considered by BCNR for the purpose of addressing and resolving the issues raised by the plaintiff's statement of May 24, 1985, and in light of such reconsideration to re-examine the ultimate

relief awarded the plaintiff.

2. To the foregoing extent the motion of the plaintiff for summary judgment is granted. In all other respects, it is denied.

3. The motion of the defendant to dismiss or for summary judgment is denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 12th, 1990

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VICTORIA M. VOGE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	CIVIL ACTION
	)	NO. 89-1441-A
SECRETARY OF THE NAVY,	)	
	)	
Defendant.	)	

Friday, January 12, 1990
Alexandria, Virginia

Transcript of motions proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * *

THE COURT: This comes on the cross motion for summary judgment and defendant's motion to dismiss.

I take it the parties agree that the record is adequate to enable the Court to resolve it on summary judgment?

MR. FIDELL: The parties do not agree that the record—that the contents of the record are clear, Your Honor. You may recall that in a footnote we pointed out

that we have been furnished a copy of the December 1989 version of a record that bears a certificate that shows there are 56 more pages than were furnished to us, and then I presume were filed with the Court. If I could ask the Court to advise me, how many, what the last numbered page, Your Honor, is in your record.

THE COURT: 538.

MR. FIDELL: Your Honor, the document we were furnished had 482 pages, but it had a certificate that represented that there were 538 pages. So there are 56 pages in this record that I don't know.

THE COURT: I'm not going to let this case get further bogged down over the absence. If you want to look at the other 50-some pages, you are welcome to come and look at them at any time.

MR. FIDELL: Thank you.

THE COURT: They have been here for some time.

MR. FIDELL: Yes, Your Honor.

THE COURT: With that out of the way, is there anybody—I mean you do not assert that the record is not sufficient to enable the Court to resolve the matter on summary judgment?

MR. FIDELL: No, I think the case is properly here on summary judgment.

THE COURT: All right.
Yes, sir.

MR. FIDELL: Thank you. Your Honor, there are it seems to me two levels of this case. One has to do with justiciability. The other has to do with merits, and as to each of those, there are four elements.

Specifically, we have invited the Court to address the decredentialing of Dr. Voge, the preparation and maintenance of certain psychiatric records relating to her, several fitness reports, and her passover for promotion to captain.

We suggested in our papers that these were interrelated because among other things the fitness reports relate to the decredentialing; the decredentialing and the psychiatric records, in turn, are part of a single res gestae, and as the Court is familiar, I think through many, many cases, there is a direct correlation ordinarily between fitness report contents and whether or not one is promoted in the naval service.

With respect to justiciability, we stressed in our papers that Congress has indicated that decredentialing controversies are justiciable in relatively recent legislation, legislation that is retroactive and that applies to this case.

In addition, the Court has ample standards to guide the exercise of its review function in the fair hearing plan that the Navy promulgated. It's a very detailed set of blueprints, and there is no question about whether the Court would be at sea, so to speak, in performing its review function.

With respect to the psychiatric records, these are unquestionably subject to review by the Board for Correction of Naval Records, and it's also unquestionably the case that decisions of the BCNR are subject to review here. My hunch is that over the course of any year you and your colleagues see some number of cases arising from this and the other correction boards.

The fitness reports are of course reviewed all the time in passover cases. Indeed, in the case of Reamy (phonetic) [Remy] against Secretary of the Air Force, which

was decided by one of your brethren, the review was afforded with respect to fitness reports. Similarly, as to passovers, this is completely garden-variety military personnel litigation. I really don't think there is a substantial question as to whether these are justiciable matters.

That said, I would like to address the merits of each of those categories.

With respect to the credentialing issues, the Secretary of the Navy promulgated an instruction that included a fair hearing plan. This is as a practical matter the equivalent of the bylaws of a hospital, and the purpose of course is to afford due process.

THE COURT: Where do you say she was not afforded due process?

MR. FIDELL: Specifically, Your Honor, she was not afforded the process that—

THE COURT: (Interposing) Her main argument seems to be that the initiating decision which gave her notice of proposed actions sort of locked in the ultimate decision maker and gave them preconceptions of what the outcome was going to be and therefore the hearing that she did attend in June was preordained in result. It seems to me they gave her at least due process she was due. These decisions of proposed action have to be initiated somewhere by somebody, and that body may also be a portion of or some segments of it or components of it be part of the ultimate decision maker it doesn't seem to me invalidates the matter from due process.

MR. FIDELL: Well, with all respect, I think that the case is a far stronger one than your comments would suggest. Specifically—of course there has to be an initiating action, and in this case, and I think this is quite revealing—

in this case the chief of clinical services and another physician at the Naval Hospital in Guam, who had personal involvement and who as far as I can determine the initiators of the proceedings or at least were substantial actors in the decision to initiate, recused themselves from the second secret meeting.

That's not simply an interesting fact. It's a pivotal fact because what that means is that someone in Guam recognized that there was a need to make sure that only people who did not play the initiating role participated in the ultimate hearing process.

What happened here was there were two ex parte meetings, at which the vast majority of the people who ultimately sat on the credentials review committee became privy to information concerning this case. The case in chief has certain momentum. That it seems to me is quite unquestionable on this record, and by the time a hearing was held at which this physician had an opportunity to speak up for herself and to have the rights that a fair hearing plan afforded her, two meetings had already taken place without her presence.

To suggest that those were merely preliminary proceedings, it seems to me, does not apply the sense of realism that we think the Court ought to apply.

In a way it's like having a Grand Juror sit on the trial jury. I don't think that's what the Secretary had in mind when he promulgated this regulation. I think that the fact that there were two recusals at the second meeting shows that those officers knew that there was something not right about people who had played a prior role in the matter participating in the decision.

THE COURT: Doesn't the regulation say as near as possible or practicable?

MR. FIDELL: Yes, that's correct, Your Honor, but

there isn't a syllable in this record, however many pages there are in it, there is not a syllable that indicates there was an unavailability of personnel or that a particular number of people had to participate.

It just doesn't say that. I think you may recall, and I know this Court is familiar with the military justice system. There are circumstances under which, where you, because of military exigencies let us say, can't assign a military judge, or you can't find a lawyer or attorney to do a court martial in the field, what the command does at that point is make a matter of contemporaneous record the reasons for not abiding by the basic obligation, and I think had something like that been done here, the BCNR and indeed this Court would be faced with a somewhat different situation.

But here you don't have a record on which to explain the departure from the clear norm at the regulation. So that I think is what I would like to leave the Court with, with respect to the credentialing.

This is not a situation where the Secretary's regulations were conformed with. The fact that there were two meetings at which this matter plainly achieved a considerable measure of momentum is incompatible with the spirit and the letter of the regulations.

We cited in our last papers, Your Honor, a Fourth Circuit case, which I would ask that the Court take particular notice of, which talks about the interpretation, agency interpretation, that cuts against the tenor of the applicable regulation. This is Charlotte Memorial Hospital cited on page 7 of our reply.

I would suggest that the interpretation that the Navy would apply now for this case to its regulation, a regulation which by the way we have no quarrel with. It's a good regulation. But the interpretation that the Navy would like to retrofit to what happened in Guam is one that cuts against the tenor of the regulation.

I would like to address myself if I may to the psychiatric records, and in doing so, I would like to specifically invite the Court's attention to the fact that we are here under Section 706 of the Administrative Procedure Act, which calls for review of the agency decision on the record as a whole and specifically the Universal Camera Case. That's the major gloss on that.

The key, if I can, Your Honor, refer you specifically to some pages of the record. This may be something that the solitude of the quiet of Chambers may be better suited to than taking time in open Court.

THE COURT: The solitude of Chambers is a myth.

MR. FIDELL: Well, I take your point.

In any event, if I can refer the Court to pages 216 to 218, Your Honor, of the record made before the Board for Correction of Naval Records.

This, Your Honor, is the workup that Lieutenant Commander Tinelli (phonetic) prepared, and as I read over it, I kept on looking for what it was of a psychiatric nature that started this process rolling. And I came away unnourished. I noted that this was a command initiated psychiatric evaluation. I noted that the reference to Dr. Voge's claimed reluctance to do clinical medicine in view of her function as more administrative and regulation oriented; her perceived administrative function has caused this Court between the squadron and its flight surgeon, who was a coworker, she was offered an opportunity to polish her clinical skills and so forth.

This is not matters of a psychiatric nature. At the end of the next paragraph, Dr. Tinelli observes that Dr. Voge could not appreciate the seriousness of the present and past situations. In other words, that Dr. Voge appeared to be at cross-purposes with the command. That is not an assertion of a psychiatric disorder.

The next paragraph, she was instructed by the CO to improve relations with her coworker but the situation in the last two months has deteriorated and she is now alienated from virtually the whole hospital community.

Well, that doesn't say to me and I think to a reasonable reader, this is a person who requires psychiatric attention.

The final incident on page 2 has to do with a specific procedure employed in the clinic. It has to do with whether a male medical foreman can under any—conduct unsupervised pelvic examinations. Dr. Voge, this chit says, defended her actions as being within regulations. She never accepted the fact that a junior corpsman should not do pelvic examines on an unsupervised routine basis.

This doesn't talk the language of psychiatry, Your Honor. It goes on. She and her husband, who is also a naval officer, by the way, appear to have a stable and enjoyable relationship. Read the last paragraph. Mental status exam. Now we are getting warm. Now we are talking about what you see a psychiatrist about—presented—it's a wonderful word that physicians love and psychiatrists love—presented as a neatly attired female, clear sensorium, speech normal in rate, appropriate in syntax, affect cheerful but unable to appreciate the seriousness of her present situation, namely, the command was angry at her.

She gave the impression of taking pride in battling alleged discrimination against her, overall appearance of being distant and unemotional. I know a lot of people who are distant and unemotional, and I think it would be absurd to think that those are the things that lead you to a psychiatrist interview.

Thought processing was logical and coherent, and her thought comment was dominated by the self-perceived discrimination against her. No evidence of any psychotic thought and so on.

Opinion—the naval air station clinic has deteriorated from an integrated and functioning unit to almost total demoralization and chaos.

That's not a psychiatric representation. It's an administrative representation. Whether or not it's true, this is ridiculous as a basis for causing this naval officer and physician to be subjected to a diagnosis and to be required to go to the mainland for further workup by other psychiatrists.

When she did get that further workup, as I know the Court knows, she was found fit for full duty. We have in this record—the Government, Your Honor, in it's papers, stressed the Supreme Court's decision in the Lorion Case. I'm not sure of the pronunciation. L-o-r-i-o-n against Florida Power and Light, which says that you judge these matters on the record made here—on the record made before the agency and not some new record. We couldn't agree more.

The record before the BCNR hasn't got a syllable of refutation for the fact that Dr. Tenelly confessed to my client that his diagnosis was bogus and it hasn't—

THE COURT: Did the board ever discuss that?

MR. FIDELL: Not that I recall. The board's treatment of this case, Your Honor, to be perfectly honest was perfunctory.

THE COURT: Well, without regard to that, did they specifically address the affidavit or statement that the plaintiff makes that the author of this report had stated to her that it was command influence, and but for that, she would not have—

MR. FIDELL: I recall no such reference, Your Honor.

THE COURT: I can't find it.

MR. FIDELL: I don't see how an agency can make a decision where the evidence is unrebutted on the record that a factor like that played a role. It seems to me that a decision only one way is possible.

THE COURT: Well, but— (pause)

MR. FIDELL: While I am at the store on that particular point, Your Honor, another point that is not rebutted is Dr. Voge's representations that shortly after she arrived at Guam, the commanding officer, Captain Bramlett (phonetic), who caused the psychiatric process to be initiated, said to her that he had heard all about her and that he knew that she was troublemaker, his word. This is unrebutted.

If you look—this is why I referred to the substantial evidence on the record as a whole test and Universal Camera—

THE COURT: (Interposing) Well, the board may have found out that she was a troublemaker. I mean—

MR. FIDELL: Say it again, please?

THE COURT: That she was. I don't know that they did, but—

MR. FIDELL: The question is not whether she was or not. The question is whether the well was poisoned against her because of actions that she had taken in her capacity as the medical advisor at the Naval Safety Command, which may have brought her into conflict with the medical management of the Bureau of Medicine and Surgery, and when a person, when the well is poisoned

before a person even gets to Guam, never mind why she happened to be sent to Guam. Frankly, people used to joke about that when I was on active duty about being sent there, but this is not a process that is anything near the kind of disinterested official determination that the Administrative Procedure Act and that Section 1552 contemplates.

Finally, and we stress this in the last submission that we made, Your Honor, the suggestion in the Secretary's papers that the reason Dr. Voge received a fit-for-full-duty report at the conclusion of her visit to Balboa Naval Hospital was because she had been treated there is ludicrous. I will go no further than to simply ask that the Court review the record references that we have given in this regard. There was no treatment, and any suggestion to the contrary is really an imposition on rational thinking.

With respect to the fitness reports and passovers, I think that they stand or fall on what I have already said, and that being the case, I would simply offer to respond to any questions you may have, sir. Thank you very much.

MS. KIMBALL: May it please the Court, this case represents a difference of opinion between Commander Voge, who is a naval officer and a medical doctor, and her medical superiors about her medical competence while she was stationed in Guam.

THE COURT: Well, what have you to say, though, about the statement which is in the record and apparently not addressed, or at least I can't find it in the board's decision by the plaintiff, that this doctor who rendered the report we have been discussing, page 218 of the record, has stated to her that report was command-influenced?

MS. KIMBALL: Well, of course this is a statement by Commander Voge, Your Honor.

THE COURT: Sure.

MS. KIMBALL: It isn't necessarily evidence.

THE COURT: And if the board rejected it, that's fine, but the board didn't even address it.

MS. KIMBALL: Well, the board did address the psychiatric reports, Your Honor. That will be at page 9 of the report.

THE COURT: Don't you think that that was an important aspect? This psychiatric report, despite the subsequent one that exonerated her from psychiatric problems, is a very damning—its conclusion is very damning to the plaintiff. It says she is paranoid and some other terms that I am not, that I don't understand. But it seems to me that it's there, and to what extent it was relevant in the actions taken with regard to the plaintiff, when the board didn't even address it, we really don't know.

MS. KIMBALL: Well, what the board did say is that they find that the psychiatric evaluations and medical board report were properly entered in petitioner's naval record. Now, that suggests under the standard that the board operates under, which is to correct an error or remove an injustice, that they found no error or injustice. Beyond that, Your Honor, I can't speculate.

While the plaintiff was stationed in Guam due to the multiple instances of poor medical judgment on her part and also due to the evidence of interpersonal problems that she was having, the commander asked the staff psychiatrist to evaluate Commander Voge. Even though the staff psychiatrist made a diagnosis, he also recommended that a second opinion be obtained. That second opinion of course was the one obtained at an independent facility in San

Diego.

THE COURT: Is that Balboa?

MS. KIMBALL: The Balboa, yes, Your Honor, it is.

What's at stake here really is the obligation and the responsibility of the Department of the Navy to insure that their medical doctors are competent to treat naval personnel and their dependents. That's what at issue here.

THE COURT: Well, nobody denigrates the importance of that. But what does concern me is the very thing I have just been discussing with you. Here is what she said in her certification: on August 19, 1982, Tenelly—that's the doctor that said she was paranoid—he stated that he only gave me a psychiatric diagnosis because he was ordered to do so by the commanding officer, Bramlett, the man who is alleged to have been giving the plaintiff a hard time from the minute she arrived in Guam—and he only wanted to know why I was sent to Guam for them to, quote—oh, and that Captain Bramlett had been ordered to do so by BUMED, which is a—what is BUMED?

MS. KIMBALL: Bureau of Medicine, Your Honor, I believe.

THE COURT: He stated they wanted to know why I was sent to Guam for them to quote, "Do all that to me."

I would have thought that would have been something the board would have addressed in its decision.

MS. KIMBALL: Well, we don't have any evidence really that it didn't.

THE COURT: We have the board's decision.

MS. KIMBALL: We have the board's decision and—

THE COURT: And it doesn't mention that.

MS. KIMBALL: It doesn't go into that specific detail, no.

THE COURT: It doesn't go into it at all.

MS. KIMBALL: It has a paragraph which addresses the fact that they did review the psychiatric reports. That's all we can tell from a review, that's correct, Your Honor.

The standard here is whether the plaintiff can demonstrate by cogent and clearly convincing evidence to this Court that the decision of the Board of Corrections of Naval Records was arbitrary, capricious, contrary to law or not supported by the evidence. She has failed to make that showing her. There is really nothing more that I can add to that, Your Honor, unless you have some further questions.

THE COURT: You don't think that the failure to address that allegation is arbitrary? It's a serious allegation.

MS. KIMBALL: The question is, was there a perceived error? Was there an injustice? That's the question that we have to ask here.

THE COURT: If what she says is true, then that psychiatric record in her record is an injustice, isn't it? If a doctor has put in her record a statement that she is paranoid on order of a commanding officer, and that is why he did it, and that remains in her record, that's an injustice, isn't it?

MS. KIMBALL: Well, it's possible that Your Honor would send this case back to the Department of the Navy

and ask them to look into that question.

THE COURT: That doesn't answer all of the plaintiff's complaints about this decision, but that's the one that jumped out at me.

MS. KIMBALL: Well, certainly. Well, perhaps I can address some of the other questions that have been raised by the plaintiff in this case.

The plaintiff maintains that it was these two individuals who were responsible for raising the question about her medical competence. Well, that isn't true. If you look at pages 184 and 185 of the administrative record, it talks about where the evidence of her, the instances of her poor medical judgment are taken from, a review of the emergency room treatment records, random sample of outpatient entries, a letter from apparently the husband of a patient who had been treated there. Also, criticisms from her fellow coworkers about the suboptimum treatment that Commander Voge was giving to patients there.

There is certainly sufficient evidence in this record, and I would refer the Court again as I did in the brief, to pages 187 to 198, 199 to 202, where there are multiple instances of medical incompetence that were demonstrated by Commander Voge.

THE COURT: And it may well be that the board would not have changed its ultimate decision in the matter as to her, or in a finding that her incompetence was established in the record or her deficiencies, but—

MS. KIMBALL: I think you can conclude based on the decision of the Board of Correction of Naval Records that they corrected the errors that they perceived and they did correct some errors. And beyond that, they felt that the plaintiff had been treated fairly during the credentialing

process. They thought that the psychiatric reports were appropriately entered in this record. That's really all we can say, but it seems to be sufficient.

Beyond that, I have nothing more to add. I would simply state that this decision is supported by the record, by this very ample record and that it should be affirmed.

MR. FIDELL: May I be heard very briefly, Your Honor.

THE COURT: Yes. If I find, as you may have gathered I am leading towards finding, that the failure to address this particular issue warrants a remand, and it seems to me that's the remedy, that won't guarantee that with the absence of that in the record, if the board should decide that that ought to be expunged from her record—when I say that, I am talking about that report.

MR. FIDELL: Yes, Your Honor.

THE COURT: I don't know how that would affect their ultimate decision or the passovers or the other matters of which you complain. That is the matter that concerns me the most. But I am not sure that beyond a remand, at this stage, any further relief can be obtained. I would like you to address that.

MR. FIDELL: And I appreciate the opportunity to do that, Your Honor.

In deciding whether the BCNR should be afforded a further opportunity to function on this case, I would ask on Dr. Voge's behalf that the Court be mindful of the fact that she has had to live with this—

THE COURT: (Interposing) I know this thing has been going on—

MR. FIDELL: Since 1982.

THE COURT: —a disgracefully long time, but there is not much I can do about that.

MR. FIDELL: But in framing the remand, it seems to me the Court has discretion as to whether or not to deem this matter closed based on the agency record, and make a decision whether the Secretary's decision is supported by substantial evidence with respect to the psychiatric reports. I think—

THE COURT: Where does that leave you?

MR. FIDELL: Well, as to the psychiatric—

THE COURT: We don't know whether other evidence in the record, even if the board is directed to consider that or even if I find that, as you suggest, that I ought to myself strike it from the record.

MR. FIDELL: Yes. We ask for an injunction.

THE COURT: But where does that leave you? That doesn't promote her.

MR. FIDELL: No, it doesn't promote her, but let me—the reason that I gave for the architecture that I did at the beginning of my presentation this morning, Your Honor, is because these matters in addition to being part of a single res gestae, have independent significance to my client. She has an independent segregable interest in having no improper psychiatric records in her official file. She has an interest in having that, regardless of the sequela[e]—

THE COURT: But all I have is her bare allegation of that.

MR. FIDELL: You have an agency record not supported by substantial evidence. Otherwise, there is never going to be—

THE COURT: But normally in these APA appeals, and that's what this really, all that this is—

MR. FIDELL: Yes.

THE COURT: If the agency fails to address a subject or an issue, the proper course is for the Court to remand it, not for the Court to decide itself how it would have resolved the issue had the matter been presented to it.

MR. FIDELL: Let me suggest that there is a sense in which counsel has made a good point. She contends that the BCNR by implication ruled on this matter. That was her presentation. If so, the matter is at an end in terms of the evidentiary process.

THE COURT: Yes, but they didn't—I mean, if they did, they didn't say anything about it.

MR. FIDELL: Their attorney has made a representation on this, and I would treat, and I think the Court would be on firm ground, particularly given the passage of time, the Court would be on firm ground in treating that as a representation that the record is at an end for purposes of that psychiatric issue. I think that there is a judgment that can be made properly in terms of framing injunctive relief. We are here before you in your capacity as the chancellor, and you have some discretion in framing the injunction. We think in determining whether the remand is

the injunctive remedy that's appropriate, because that is an equitable remedy, as opposed to drawing the white sheet over this controversy if at all possible. We think you have the discretion and we think that we have by far the better of the argument, in terms of the interest at stake, and the damage that has been done.

I would say that on the other side of the scale, there is nothing, because the Navy will in no way be harmed by excision of that psychiatric record, because my client, number one, has ultimately been found fit for full duty, and number two, she is a functioning naval officer even as we speak.

So when you apply your chancellor's yardstick to this, I would hope that you would give very sympathetic attention to the fact that this controversy like others has to be drawn to a close.

As to the psychiatric report, we don't think there is a substantial basis for affording the Navy a further opportunity to remedy the matter that has been known about for over seven years.

Now, Your Honor, there is one thing that I have neglected to address in my opening remarks, and may I simply invite your attention to the fact that I referred to in a footnote. Because we were sent two different records in different order, we were compelled, for no fault of my client, to revise our brief in this case. And that occupied four-and-one-half hours of time. I would ask the Court to give attention to whether that expense ought to be borne by the Secretary in the circumstances. Thank you very much, Your Honor.

THE COURT: I would like to hear from the defendant on the scope of relief. This matter has been going on now for a long time.

MS. KIMBALL: It was originally brought in the United States Court of Claims by the plaintiff.

THE COURT: And went up to the Federal Circuit and cert was denied and back down to the District Court and then the District Court ultimately, after waiting a time, sent it over here.

MS. KIMBALL: That's correct.

THE COURT: There comes a time, even with administrative records, because, to reopen this thing now, I don't know what was the date of the decision—

MR. FIDELL: Three-and-a-half years ago, almost four years ago, Your Honor.

THE COURT: The personnel on that board has changed.

MS. KIMBALL: Commander Voge of course challenged her records when the case was pending in the Court of Claims. It's through no fault of the defendant that the Federal Circuit determined that the Claims Court didn't have jurisdiction, Your Honor. But the question here is, you know, the question that they are asking is to have this Court consider the fitness of Commander Voge. That is the problem here. And if Your Honor concludes after looking at the record that in your opinion there is some question about whether the board's decision is complete then the proper response to that of course would be to remand it back, with directions for the board to take a look at that question.

But the ultimate question is how is that going to affect the ultimate outcome in this case?

THE COURT: We don't know.

MS. KIMBALL: That's true, we certainly don't.

THE COURT: That's what concerns me. I am not in a position to decide.

MS. KIMBALL: It certainly won't affect the ability of Commander Voge to be considered for retroactive promotion as she has asked. It will be a very narrow question, what to do about the report.

THE COURT: All right. This case deserves, just as a matter of mercy, a decision and a final decision, but I am afraid that the appropriate remedy here is to remand the case, because except for the issue that I have raised, and that is the allegation which the decision of the board does not address, that this psychiatric report, which appears in the record at page 216, I think, was command-influenced and command-ordered. I find that the due-process rights were otherwise met insofar as this plaintiff's treatment is concerned, but because I'm not sure what, if they decided it, I mean, if they considered it, the board would do with this allegation and whether they would find it unfounded, whether they would, despite it, they would still come to the conclusion that they did, whether they would decide that that psychiatric record ought to be removed from her file, or her record, I just don't know.

They are in a better position to decide those things than I. So, the motion for summary judgment of the plaintiff will be granted to that limited extent. I will remand the case to the board for reconsideration of its decision after a consideration of the statements contained in the plaintiff's May 24, 1985, certification, and whether and to what extent that will affect their ultimate decision.

Beyond that, I am unwilling to interfere with the board's decision. But that will be my order in the matter.

MR. FIDELL: If the Court please, will the Court entertain a fee application?

THE COURT: Under the— (pause) I would be encouraging you to waste your time.

MR. FIDELL: You have answered my question. Thank you.

THE COURT: I will prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTORIA M. VOGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 89-1441-A
SECRETARY OF THE NAVY,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is ORDERED that:

1. The motion of the plaintiff, Victoria M. Voge, for summary judgment is denied.

2. The motion of the defendant, Secretary of the Navy, for summary judgment is granted.

3. The appeal of the plaintiff from the March 4, 1993 decision of the Board for Correction of Naval Records is dismissed, and that decision is affirmed.

/s/ Albert v. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 13th, 1993

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTORIA M. VOGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 89-1441-A
SECRETARY OF THE NAVY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This action is an appeal, pursuant to the Administrative Procedures Act, from a decision of the Board for Correction of Naval Records (BCNR). Originally before the court on January 15, 1990 on cross motions for summary judgment, the action was at that time remanded to the BCNR to consider whether an April 12, 1982 report of a psychiatric examination which diagnosed the plaintiff as having a "[p]aranoid personality manifested by over-suspiciousness, hypervigilance, and restricted affectivity" was command influenced.

The order of remand refers to the issues raised by the plaintiff's May 24, 1985 statement. The plaintiff now argues that the plural use of the word allowed and directed the BCNR on remand to explore issues other than whether the report was command influenced, including a reexamination of the underlying correctness of the April 12, 1982 report and new issues raised by a more recent communication from the author of the report.

The court disagrees. The use of the plural was unfortunate, but the succeeding clause in the first paragraph makes clear that the issue raised by the May 24 statement which the court felt needed exploration by the BCNR was whether the report was command influenced.

The BCNR has complied with the remand. It considered both the plaintiff's statement and the statement of the officer who had allegedly influenced the report, Captain Charner W. Bramlett. He unequivocally denies ordering any diagnosis of the plaintiff. The BCNR also considered the statement of Dr. Eugene T. Tinelli, the author of the 1982 report. While declining to respond to the inquiries of the BCNR, Tinelli did respond to the plaintiff's inquiry and produced a letter, dated October 30, 1990, which in agreement with Bramlett unequivocally denies any order from Bramlett to perform a psychiatric examination of the plaintiff. Finally, the BCNR sought an advisory opinion regarding the performance of Tinelli from a psychiatrist, Captain John M. Mateczun, who opined that Tinelli's diagnosis was within a degree of competence expected of a reasonable, prudent psychiatrist.

The plaintiff challenges the independence of Mateczun, pointing out that he is a naval officer. The report is apparently objective, and Mateczun's naval connection does not warrant its being disregarded. The report adds little to the question whether Tinelli's 1982 report was command influenced; however, it does provide evidence that the 1982 diagnosis was professionally supportable.

The statements of Bramlett and Tinelli, and to a lesser extent that of Mateczun, provide substantial evidence for the decision of the BCNR on remand that the 1982 report was not command influenced.

Nor does the manner in which the matter was handled on remand evidence arbitrary or capricious behavior on the part of the BCNR in arriving at its decision. Although it held no evidentiary hearing which would have

permitted an opportunity for a more informed credibility decision, none is required; and the BCNR, having the entire record before it, was well within its competence in resolving the issue on that record. It is no fault of the BCNR that Tinelli would not respond to its inquiries, but rather had to have his comments elicited at the plaintiff's request.

That the BCNR did not have the benefit of Tinelli's letter until after its first post-remand report of October 4, 1990; and that it did not address the post-remand evaluations of the plaintiff by Dr. Raymond M. Costello, a psychologist, and Dr. Terence F. McGuire, a psychiatrist, do not alter the court's view as to the arbitrary or capricious nature of the Board's decision. McGuire and Costello attack the underlying 1982 diagnosis. Mateczun addressed this also to some extent, but the underlying correctness of the diagnosis, *unless it was command influenced*, was not a subject of the remand. The underlying correctness of that diagnosis had, of course, already been addressed in the original, February 4, 1986 decision of the BCNR.

Tinelli's October 30, 1990 letter raises some problems for the plaintiff. Rebuffed in her hope for confirmation of her position on remand, namely, that Tinelli's 1982 report was command influenced, she seeks to gain comfort from other contents of the letter. First, she says that property read the letter undermines the correctness of the 1982 diagnosis. But this is not what Tinelli says. He never concedes, as Mateczun points out, that his 1982 diagnosis was wrong. He says that "with the clarity of almost a decade of hindsight, I would not diagnose [Dr. Voge] with Paranoid Personality," but wishes that he had given her a diagnosis of "Diagnosis Deferred." This does not support the plaintiff's argument that Tinelli in effect now says that there was "no diagnosis" in 1982.

Second, Tinelli's letter launches an attack on the Navy's treatment of the plaintiff, which the plaintiff seeks to use as a further basis of her claim of injustice and her

challenge to the correctness of the April 1982 report and the May 12, 1982 evaluation and recommendation by the Psychiatry Department at the Naval Regional Medical Center in San Diego.[1] To use Tinelli's letter in this way requires a change, indeed a reversal, of a substantial portion of the plaintiff's arguments prior to remand. Prior to remand the plaintiff took the position that she had suffered an injustice because the reports of her alleged "trouble-making" propensities had preceded her when she went to Guam, causing her supervisors there to be predisposed to treat her unfairly. Tinelli, on the other hand, faults the Navy for *not* having notified the command on Guam that there were any "prior problems concerning Dr. Voge's behaviors." He elaborates on this as follows:

> This presented a major problem since Dr. Voge thought that we knew information about her prior to her arrival and we didn't. She thought we were watching her very closely and, after a while, we were. When we tried to be friendly and helpful, as individuals and as a medical group, she became more suspicious and more defensive. Thus, on Guam, she appeared over-suspicious and paranoid, even though some of this suspiciousness may have been justified. The hospital command and many of my fellow physicians and physician's assistants went to great lengths to try to work with Dr. Voge, however she rejected the help. My gut feeling is that if we had been properly informed by personnel at her prior command, this pro-

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[1] The substance of this report is beneficial to the plaintiff; however, her reason for wanting it expunged is that the very fact of having been referred for such an evaluation is a harmful mark on her record.

gressive tragedy of over-suspiciousness may never have occurred.

How to reconcile these viewpoints was the plaintiff's problem, but Tinelli's opinion was there for the inquiring prior to remand, and indeed, presumably prior to the original February 4, 1986 decision of the BCNR. The court is unwilling at this date, even if competent to do so, to undertake to reconcile the two positions, or to use Tinelli's arguments to find support for the plaintiff's claim for injustice.

Accordingly, the motion of the defendant for summary judgment will be granted, and that of the plaintiff denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 13th, 1993

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370-5100

DJU: vmt
8827-85
4 February 1986

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: VOGE, Victoria M. CDR, MC, USN, 040-58-0657/2100; Review of naval record

Ref: (a) Title 10 U.S.C. 1552

End: (1) DD Form 149 dtd 18Sep85 w/attachments
(2) 1611 NMPC-32CC/75 memo of 1Nov85
(3) 5420 NMPC-22M memo of 27Nov85
(4) 5420.L NMPC-06L memo of 17Dec85
(5) Subj's counsel's ltr dtd 3Feb86
(6) Microfiche record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting the following, quoted from pages 100 and 101 of her counsel's brief:

a. Declare invalid and remove from all records any and all references to the proceedings of the NRMC [Naval Regional Medical Center] Guam Credentials Committees which convened on 9 Mar 1982, 27 May 1982 and 17 June 1982.

b. Remove from her records all references to each and every administrative action, docu-

ment, letter, message or report of CAPT Bramlett and CAPT Rahe and/or their superiors, agents, subordinates and employees, flowing from, regarding or touching on the proceedings set out in paragraph a, above.

c. Correct her records to show that her formal credentials application of 22 Dec 1981 was favorably acted upon and she was granted the defined clinical privileges therein requested with an effective date of 24 Feb 1982 (the date her temporary privileges were due to expire).

d. Expunge all Naval documents and references thereto (wherever located, including, but not limited to, Naval Hospital, San Diego and Naval Hospital, Guam (formerly NRMC, Guam) concerning the psychiatric reports rendered on applicant by LCDR Tinelli, NRMC Guam on 12 April 1982 and by the Psychiatric Department, NRMC, San Diego, CA on 12 May 1982.

e. Remove from her record the entire adverse fitness report (31 Oct 1981—16 June 1982) rendered by CAPT Bramlett and delete from the successive fitness report rendered by CAPT Rahe (17 June 1982—1 April 1983) any references to the decredentialing proceedings and require Navy to insert an appropriate and nonprejudicial explanation for the absence and deletion.

f. Correct her record to show that she has been entitled to additional Special Pay, without

interruption, since 1 July 1982 and that the denial of such pay for a period of three years was based on illegal considerations. She further requests that she be awarded the appropriate back additional Special Pay due under Navy regulations.

g. Correct her records to show that her Article 138, UCMJ [Uniform Code of Military Justice] complaint of wrongs, dated 10 August 1982, was found to be meritorious by CHBUMED [Chief, Bureau of Medicine and Surgery] and approved by the Secretary of the Navy and, as far as now possible, show that her requested redress was granted.

h. Correct her records to show her Article 138, UCMJ complaint of wrongs, dated 5 May 1983, was found to be meritorious and was approved upon final review by the Secretary of the Navy and, as far as now possible, show that her requested redress was granted including a specific finding that the investigation by CDR Baggs and actions thereon by CNBUMED were contrary to law and regulation and therefore null and void.

i. Following the correction of her records, request her folder be considered by a special promotion board. If selected, grant her retroactive promotion with service credits, back pay, and all other benefits appertaining.

2. The Board, consisting of Messrs. Hensley, Courtney and Schultz, reviewed Petitioner's allegations of error and injustice on 30 January 1986 and completed its delibera-

tions this date. Pursuant to its regulations, the Board determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Petitioner, a medical officer with a flight surgeon specialty was attached to NRMC, Guam, from 31 October 1981 to 31 March 1983. She was assigned to the Branch Clinic. Petitioner also served as an advisor to the Commanding Officer (CO), U.S. Naval Air Station, Guam.

c. Upon her arrival at NRMC, Guam, Petitioner was granted temporary clinical privileges for 90 days. This was standard procedure for all newly reporting physicians. As indicated at paragraph 3.f below, this observation period was extended for another 90 days. On 17 June 1982 the NRMC, Guam, Professional Credentials and Standards Committee (hereinafter the credentials review committee) recommended that Petitioner's temporary clinical privileges be revoked and that she not be credentialed to practice medicine at NRMC, Guam (enclosure (1), Tab A).

d. On 15 July 1982 the CO, NRMC, Guam, instituted the recommendation of the credentials review committee and revoked Petitioner's clinical privileges (enclosure (1),

Tab B). That same day the CO cancelled Petitioner's assignment as a flight surgeon to the branch clinic and reassigned her as special assistant for quality assurance matters (enclosure (1), Tab C).

e. As a result of the action of 15 July 1982, Petitioner's special medical pay was cancelled (enclosure (1), Tab D refers).

f. Prior to the 17 June 1982 credentials review committee meeting, the committee had two other meetings that dealt with Petitioner's clinical privileges. The first such meeting took place on 9 March 1982. Concerned with some of Petitioner's medical judgments, the credentials review committee extended Petitioner's initial observation period for an additional 90 days (enclosure (1), Tab E). The meeting of 9 March was convened pursuant to NRMC-GUAMINST 5420.9, which was based upon BUMEDINST 6320.54.

g. On 27 May 1982 there was a second credentials review committee meeting to reevaluate Petitioner's case (enclosure (1), Tab F). After reviewing the cases where Petitioner's judgment had been called into question (see enclosure (1), Tab G) the credentials review committee voted to recommend that the CO, NRMC, Guam, consider adverse action against Petitioner (enclosure (1), Tab F). This 27 May 1982 meeting was convened pursuant to NRMCGUAMINST 6320.16 which was based on BUMEDINST 6320.62 of 29 May 1981. As a result of the 27 May 1982 Committee meeting, the CO, NRMC, Guam, suspended Petitioner's clinical privileges on 2 June 1982, pending a "full and fair evaluation" by the committee (Tab G, enclosure (1)).

h. Petitioner objects that the only one of the three

credentials review committee meetings she was invited to attend was the last one, held on 17 June 1982.

i. Petitioner contends that the first committee meeting of 9 March 1982 was not valid because it was convened pursuant to an instruction, BUMEDINST 6320.54, that had been superseded by BUMEDINST 6320.62 of 29 May 1981. The latter instruction, according to Petitioner, does not provide for an extension of temporary privileges. A copy of the pertinent portion of BUMEDINST 6320.62 is at enclosure (1), Tab H.

j. Petitioner contends that the 27 May 1982 meeting should be found null and void because she was not invited to attend even though the credentials review committee was considering whether to recommend adverse action in her case. She further contends that BUMEDINST 6320.62 does not allow for a hearing to contemplate adverse action Petitioner contends that because the 27 May 1982 meeting was flawed, so was the 17 June 1982 meeting, thereby causing all actions taken as a result of the 17 June 1982 meeting to be proper.

k. Petitioner also contends that the 27 May 1982 meeting was unfair in that the chairman of the credentials review committee, who was also the Director of Clinical Services, and the Chief of Internal Medicine both excused themselves from participation because of prior involvement in the case, but neither physically left the meeting room.

l. According to Petitioner another reason that the 17 June 1982 was improper is that several of the committee members from the 27 May 1982 meeting also participated in the 17 June 1982 meeting.

m. The portions of BUMEDINST 6320.62 which are

applicable to this case are as follows:

Para. 14-9 *Periodic Reevaluation*

a. Before expiration of temporary privileges and annually, upon the anniversary of the initial grant of defined privileges, the credentials committee must review the current granted clinical privileges. The request for reevaluation of clinical privileges with all endorsements (appendix 14-4) and significant performance data on each clinical staff member shall be evaluated. After this review, the credentials committee must make specific recommendations to the commanding officer regarding renewal of privileges.

Para. 14-11. *Fair Hearing Plan*

The following actions are considered adverse: suspending, limiting, or revoking privileges previously granted by the same activity.

a. Whenever adverse action is contemplated, the practitioner shall be afforded effective and timely notice of the right to the following procedural safeguards:

(2) A meaningful hearing before the credentials review committee at which time there must be an opportunity to be heard in person and present evidence.

d. The commanding officer shall ensure, to the extent practicable, that members of the credentials review committee hearing a particular case can be objective and independent in their deliberations. Any member with prior involvement in the matter being

considered should normally be excused from taking part.

n. During the period between the 9 March 1982 meeting and the 27 May 1982 meeting Petitioner had a medical consultation with the staff psychiatrist. The consult was dictated and typed on 12 April 1982. The staff psychiatrist diagnosed Petitioner as having a paranoid personality (enclosure (1), Tab I).

o. On 18 April 1982, on the recommendation of the staff psychiatrist that a second opinion be obtained, Petitioner was admitted to NRMC, San Diego, where she became the subject of a medical board. The diagnosis and finding of the medical board was "No diagnosis or condition on Axis I, #V710.9" and Petitioner was returned to full duty (enclosure (1), Tab I). Petitioner filed a rebuttal to the medical board report.

p. After revocation of her clinical privileges, Petitioner filed two complaints of wrong against the CO, NRMC, Guam. The complaints were filed pursuant to Article 138, UCMJ. Both complaints were denied.

q. The two fitness reports about which Petitioner complains are actually three. They are for the periods 31 October 1981 to 16 June 1982, 17 June 1982 to 31 August 1982 and 1 September 1982 to 31 March 1983. Copies of these reports are at Tabs A, B and C, respectively.

r. The fitness report for the period 31 October 1981 to 16 June 1982, Tab A, was prepared upon the detachment of the reporting senior. It is an adverse report which places Petitioner in the lowest possible category in "Mission Contribution"; recommends against her promotion; and contains mostly "I" grades, the lowest possible. The narra-

tive comments are uncomplimentary and cite instances of allegedly poor medical judgment on Petitioner's part. The narrative also contains language which refers to the prospective review of Petitioner's clinical privileges by the credentials review committee. The narrative states that the committee has advised that an adverse recommendation is contemplated. Petitioner was afforded an opportunity to review this report and filed a rebuttal thereto.

s. The fitness report for the period 17 June 1982 to 31 August 1982, Tab B, is a "not observed" report. It was prepared by the "new" reporting senior, who became the CO, NRMC, Guam, one day before the final meeting of the credentials review committee in Petitioner's case. The narrative comments state that because of the credentials review committee actions Petitioner has been without clinical privileges and therefore no opportunity has existed to observe her in the practice of medicine. Petitioner's signature does not appear in block 82 of the report, nor does her record contain any indication that this report was referred to her for comment.

t. The fitness report for the period 1 September 1982 to 31 March 1983, Tab C, was prepared upon the detachment of Petitioner. This report is rendered adverse by the comment that the credentials review committee had recommended against clinical privileges for Petitioner. The report was referred to Petitioner and a rebuttal was filed thereto.

u. Petitioner has completed clinical retraining as recommended by the credentials review committee meeting of 17 June 1982 and has gone on to a new duty station where she has performed rather well (enclosure (1), Tabs K, L and M refer).

v. At enclosure (1), Tab N, are 12 letters from various individuals who have known Petitioner and attest to her competence as a flight surgeon.

w. The advisory opinion at enclosure (2), submitted by the Director, Military Personnel Evaluations Division, Naval Military Personnel Command (NMPC), recommends partial relief in regard to the contested fitness reports. That office concludes that the entries concerning prospective credentials committee action are inappropriate and should be removed from the report for the period 31 October 1981 to 16 June 1982, Tab A. The opinion recommends outright removal of the report for the period 17 June 1982 to 31 August 1982, Tab B. Even though the report is a "not observed" evaluation, the advisory opinion notes that it contains adverse comment and as such should have been referred to Petitioner, but was not. The opinion recommends against removing the report for the period 1 September 1982 to 31 March 1983, Tab C, unless her complaints concerning the decredentialing process are found to have merit.

x. The advisory opinion at enclosure (3), submitted by the Director, Officer Promotions and Enlisted Advancement Division, NMPC, states the following:

> In my opinion, removal of the three NRMC Guam reports would have substantially increased the competitiveness of [Petitioner's] overall performance record with those of peers also eligible before the FY-86 board. Should BCNR determine that [Petitioner's] petition has merit and remove the three reports in question, removal of her failure of selection would be warranted.

Liaison with the office that submitted this opinion revealed that the references to "three" reports should read "two", referring to the two reports with respect to which the opinion at enclosure (2) recommends relief.

y. The advisory opinion at enclosure (4), submitted by the Office of Legal Counsel, NMPC, recommends no corrective action, except for the revisions in the fitness report for 31 October 1981 to 16 June 1982 recommended by the opinion at enclosure (2) and referral, rather than removal, of the report for 17 June 1982 to 31 August 1982. Concerning the 9 March 1982 meeting, the Office of Legal Counsel makes the following finding:

> Although such action was apparently contrary to the new regulation, it's [sic] practical effect was to extend the time under which [Petitioner] would be "under observation" prior to a final decision on her credentialing; it did not permanently affect her status or have direct bearing on the subsequent actions of either the committee or commanding officer.

Additionally the opinion addresses as follows the allegations of irregularities surrounding the meetings of 27 May 1982 and 17 June 1982:

> I am not convinced that any of these alleged "irregularities" require corrective action by BCNR. The two-tiered system about which petitioner complains actually afforded her greater protection than the "one-look" system for which she apparently would argue.
>
> If fact, the two-tiered system seems to be the

desired method since the requirement for notice only arises after an *initial* determination that the deciding authority contemplates adverse action. That authority can only contemplate adverse action if (1) he makes such determination on his own without the benefit of review or recommendation, or (2) he uses the review and recommendation procedures established by the regulation. Not only is the latter preferred, it seems to be supported by the procedures established in BUMEDINST 6320.62. That instruction also provides that a commanding officer shall ensure, to the extent practicable, that members of the credentials review committee hearing are objective and independent. While he should normally excuse members with prior involvement from taking part in the hearing, it is not mandatory. Since I do not feel the members of the 17 June hearing were less than objective and independent, I do not concur with petitioner's contention that the hearing must be disregarded.

z. Enclosure (5) is Petitioner's counsel's rebuttal to the advisory opinions at enclosures (2) through (4). He essentially reiterates the contentions outlined above.

CONCLUSION:

Upon review and consideration of all the evidence of record, and concurring with the advisory opinion at enclosure (2), the Board finds an injustice warranting correction of the fitness report for 31 October 1981 to 16 June 1982 (Tab A) by removing the last two sentences from the first page of the narrative and the last sentence from the second (last)

page of the narrative. In further concurrence with the opinion at enclosure (2), the Board finds that the entire fitness report for the period 17 June 1982 to 31 August 1982 (Tab B) should be removed. The Board finds that referral of the report at this late date, as proposed by the NMPC Office of Legal Counsel, would provide an inadequate remedy. The Board finds that no other relief is warranted.

The Board agrees with the NMPC Office of Legal Counsel opinion at enclosure (4) regarding Petitioner's complaints of procedural irregularities in the decredentialing process. The Board concludes that Petitioner was treated fairly in this process. The supporting statements at enclosure (1), Tab N, do not persuade the Board that the contested fitness reports are substantively erroneous or unfair. Accordingly, the Board finds no basis for granting further relief in regard to Petitioner's fitness reports or for granting relief regarding her entitlement to special pay.

The Board finds that Petitioner's selection by the FY86 Staff Captain Selection Board would have been unlikely, even if her fitness report record had been corrected as recommended above. The Board finds that removing the references to prospective review of Petitioner's clinical privileges does not alter the tone of the report ending 16 June 1982. The Board finds that even with the removal of these sentences, the report remains extremely adverse in both marks and comments. The Board is convinced that the proposed revisions of that fitness report, coupled with the removal of the "not observed" report for 17 June 1982 to 31 August 1982, would not have significantly enhanced Petitioner's competitiveness before the FY86 Staff Captain Selection Board.

The Board finds that the psychiatric evaluations and

medical board report were properly entered in Petitioner's naval record. The Board notes that Petitioner was aware of each medical report at the time made and chose to rebut the medical board report.

The Board notes in passing that it does not consider itself empowered to entertain Petitioner's request concerning her Article 138, UCMJ, complaints. In this regard, the Board notes that evidence of her Article 138 complaints should not and does not appear in her own naval record. Moreover, Article 138 of the UCMJ provides a statutory avenue for relief separate and independent from that involving the military correction boards.

In view of the foregoing, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That the fitness report for the period 31 October 1981 to 16 June 1982, dated 14 August 1982, signed by Capt C.W. Bramlett, USN *be corrected* by removing the last two sentences from the first page of the block 88 comments and the last sentence from the second (last) page of the block 88 comments. The sentences to be removed from the first page of the block 88 comments read as follows:

> This period expires on 12 June 1982 and a preliminary report of the Credentials Committee has advised that an adverse recommendation is contemplated. She will appear before this committee formally on 17 June 1982.

The sentence to be removed from the second page of the block 88 comments reads as follows:

She is aware that her future in the Navy may be in jeopardy and that it will depend upon the recommendation of the Credentials Committee meeting of 17 June 1982.

b. That Petitioner's naval record be corrected further by removing therefrom the following fitness report:

Date of Report	Reporting Senior	Period of Report From	To
31Aug82	CAPT R.H. Rahe, USN	17Jun82	31Aug82

c. That there be inserted in Petitioner's naval record a memorandum in place of the removed report, containing appropriate identifying data concerning said report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of Federal law and may not be made available to selection boards and other reviewing authorities; and that such board may not conjecture or draw any inference as to the nature of the report.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with this report of the Board's proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

f. That the remainder of Petitioner's application be

denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

/s/ Jonathan S. Ruskin
ROBERT D. ZSALMAN — JONATHAN S. RUSKIN
Recorder — Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

/s/ W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved: 7 FEB 1986

/s/ Charles J. Untermeyer
CHASE UNTERMEYER
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370-5100

BJG
Docket No: 220-90
05 October 1990

CDR Victoria M. Voge, MC, USN
D1-3, Maple Ave.
Hatfield, PA 19440

Dear Commander Voge:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

A three-member panel for the Board of Correction of Naval Records, sitting in executive session, considered your case on 3 October 1990. The Board was ordered by the U.S. District Court for the Eastern District of Virginia to reconsider removing from your record a medical report dated 12 April 1982 in light of you statement dated 24 May 1985. The Board also considered your request to remove a fitness report for 1 September 1988 to 31 August 1989. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered its file on your prior case, docket number 8827-85. The Board also considered the advisory opinion furnished by the Naval Military Personnel Command dated 31 January 1990 and your former commanding officer's letter dated 10 Septem-

ber 1990, copies of which are attached. Finally, the Board considered your rebuttal statement dated 1 March 1990 and counsel's letter dated 19 September 1990.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice regarding the contested fitness report. In this connection, the Board substantially concurred with the comments contained in the advisory opinion.

The Board again found that the medical report of 12 April 1982 should stand. The Board was unable to find, despite your statement of 24 May 1985, that the report was the result of coercion. In this regard, the Board particularly noted the statement from the former commanding officer. Counsel contends that since the psychiatrist who submitted the report did not respond to your "charges of professional misconduct", he concedes the charges are true. The Board did not agree, noting that the psychiatrist *himself* did not acknowledge receipt of your statement of 24 May 1985, therefore, he has not concurred with your assertions by failing to respond. A copy of the return receipt is enclosed, showing that it was signed by someone other than the psychiatrist.

In view of the above, the Board voted to deny relief. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to

all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

/s/ W. Dean Pfeiffer
W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to: Eugene R. Fidell, Esq.

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370-5100

BJG
Docket No: 14033-90
04 March 1993

CDR Victoria M. Voge, MC, USN
RR 3, Box 73
Gonzales, TX 78629

Dear Commander Voge:

This is in reference to your applications of 4 October 1990, 3 December 1990, and 25 April 1991 for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552, in which your requested removal of the fitness report for 1 September 1989 to 31 August 1990, sought reconsideration of your previously denied request for removal of the psychiatric evaluation dated 12 April 1982, and made a new request for removal of the psychiatric evaluation dated 4 September 1990.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your applications on 3 March 1993. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, the Board's file on your latest previous case (docket number 220-90), your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion form the Naval Military Personnel Command Military Personnel Evaluations Division (NMPC-32D), dated 27 December

1990, and the memorandum from the Specialty Advisor for Psychiatry, dated 21 January 1992. The Board also considered your rebuttal letter dated 12 February 1991 with attachment, and your counsel's rebuttal letter dated 30 November 1992 with attachments.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion from NMPC-32D and the memorandum from the Specialty Advisor for Psychiatry. Accordingly, the relief requested in your three latest applications has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board.

In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

/s/ W. Dean Pfeiffer
W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:
Eugene R. Fidell, Esq.

6000.16
21 Jan 92

MEMORANDUM

From: CAPT J. Mateczun, MC, USN, Specialty Advisor for Psychiatry, c/o Force Surgeon's Office, Headquarters, Fleet Marine Force, Pacific, Camp H.M. Smith, HI, 96861

To: Board for the Correction of Naval Records, Washington, D.C. 20370-5100

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS ADVISORY OPINION ICO CDR VICTORIA M. VOGE, MC, USN, 040-58--0657/2100

Ref: (a) Memorandum from Chairman, BCNR of 11 Jun 91
(b) Memorandum from Chief, BUMED (MED 3B5) of 20 Jun 91
(c) PHONCON CDR Mateczun (Specialty Advisor)/LT Hustetler (BUMED) of 9 Jul 91
(d) Memorandum from Chief, BUMED (MED 35B1) of 30 Jul 91
(e) PHONCON Mr. Brian George (BCNR)/CAPT Mateczun (Specialty Advisor) of 21 Jan 92

Encl: (1) BCNR File
(2) Microfiche Service Record
(3) Medical Record
(4) Additional medical information forwarded with reference (d)

1. Reference (a) requested an advisory opinion from BUMED in the subject case and reference (b) forwarded the request to the Specialty Advisor for Psychiatry with

Enclosures (1) through (3) for review, professional opinion and recommendation regarding the SNO's request. Reference (c) was a request to BUMED from the Specialty Advisor for Psychiatry for additional medical information not contained in the Enclosures; the Medical Board Report of 12 May 1982 and the Report of Psychiatric Consultation of 8 Feb 89. Reference (d) forwarded the additional information requested. Reference (e) requested return of the report directly to BCNR.

2. This reviewer is a Diplomate of the American Board of Psychiatry and Neurology in Adult Psychiatry and also a Diplomate of the American Board of Forensic Psychiatry. In the preparation of this report the enclosures were reviewed. No interview of the applicant was performed and the report is correspondingly limited. I apologize for the time consumed in the preparation of this report. I had begun review of this complex request for correction of records from a physician lodging serious allegations and subsequently received short notice orders for a permanent change of station which I have executed. Rather than have another reviewer begin the review from scratch I retained and completed it myself.

3. Recommend the request for removal of the NAMI psychiatric evaluation from the Navy's records be denied.

4. The application for correction of records contends that the psychiatric evaluation was "invalid" citing as supporting evidence:

a. An "independent psychiatric (sic) evaluation days before the Navy evaluation" which "found no pathology, personality or otherwise." This apparently refers to Enclosure (2) to the application "Psychological report by Dr. R. Turner, Head of Outpatient Psychiatric Services, Temple

University, dtd 17 Sept 1990, with Dr. Turner's C.V."

Comments: The evaluation referred to was performed by a doctorate level psychologist who is licensed to practice clinical psychology. The report of the evaluation is a summary of psychological test findings without raw data. Although the findings are of interest they comprise only a portion of what would be considered a *psychiatric* evaluation. The structured interviews that were used are reliant upon accurate self-report by the patient. No outside sources of information were reported.

The report includes *no psychiatric history*. Without a psychiatric history no psychiatric evaluation or diagnosis would be complete or valid. Although knowledge of previous evaluations is cited in the report there is no evidence that they were reviewed by the evaluator nor is any history contained within the previous evaluations addressed by the report.

Of concern is apparent bias of the evaluator reflected in the statement ". . .it appears that the Navy has attempted to utilize psychiatric reasons for sabotaging Dr. Voge's career." The statement is made in the "Reason for evaluation" section and contains no data which would support such a conclusion.

In summary, as a reviewer I placed little value on this evaluation in supporting the petitioners request.

b. BUMED letter Serial NAMI 9003712 and dated 22 Oct 90 cites the psychiatric evaluation performed at NAMI and finds CDR Voge physically qualified but not aeronautically adapted due to a personality disorder. BUMED letter, Serial 02/0167, dated 13 Nov 90 and signed by RADM Buckendorf is cited in support of the application by

CDR Voge with a parenthetical comment that "(para 2 states psych report not supportable)". The letter supersedes and cancels the finding of physically qualified but not aeronautically adapted. Paragraph 2 of the cited letter notes that the concept and applicability of aeronautical adaptability need better definition and opines that until changes are approved the basis of the disposition in CDR Voge's case would not withstand close scrutiny.

Comment: There is no reference to any problem with the psychiatric evaluation at NAMI in either of these documents. The interpretation by CDR Voge in her parenthetical comment is not supported by the evidence in the documents.

c. The petitioner also cites "My comment for the record re: NAMI psychiatric evaluation dtd 4 Sept 1990" dtd 1 Oct 91, with enclosures". In that "comment" she alleges "distortion of facts, use of information out of context, and frank fabrication" in her psychiatric evaluation at NAMI. She includes enclosures to support her allegations to include:

(1) "My memo, dtd 1 Sep 90; brief summary of events during my NAMI evaluation, (27 August to 30 August 1990". This consists of short statements summarizing from CDR Voge's viewpoint the evaluation period.

Comments: There is nothing in the way of factual material that would serve as evidence that the evaluation was improperly conducted.

The statement that "—All psychological tests were read as normal" deserves comment. The testing results recorded in paragraph 5 of the report of psychiatric evaluation are descriptive of functioning and not necessarily

normative in nature.

The results of the psychological testing performed at NAMI may have been affected by CDR Voge having received many of these same psychological tests some eleven days prior to their administration at NAMI. The neuropsychologist who administered and interpreted the testing was informed of the previous test (per CDR Voge's report in her memo of 1 Sep 90). Additionally, the interpretations by Dr. Turner from Temple ("...The only deficit finding is that . . . she would clearly rather stick to facts and concrete reality than attempt to generate and construct new ideas and inventions.") and Dr. Moore from NAMI ("... obsessive concern with being accurate, being precise and preferring to minimize ambiguity and constrain affective displays. There was a tendency to over-simplify input in order to make the world seem less threatening . . .") are akin and would seem to reliably relate to obsessive defenses and rigidity.

(2) "My memo, dtd 1 Sep 90; sequence of events during my psychiatric evaluation at NAMI". This is a day by day description by CDR Voge of her recollections of the evaluation process.

Comments: The focus is primarily an iteration of CDR Voge's perceptions and reiteration of the facts as she sees them. There is nothing in the way of factual information that would indicate lack of an adequate evaluation. The memorandum in fact details a lengthy evaluative process.

The statement contained in 29 Aug—p.m. that "I reminded him Dr. Tinelli told me he lied, and that he was told to do so by the CO who was told to do so by BUMED" is directly contradicted by Dr. Tinelli's letter of 30 Oct 90

to CDR Voge's attorney which is contained in the BCNR file. The 29 Aug—a.m. report relates CDR Voge's expectation that the evaluation team at NAMI would "follow orders" as did the CO and psychiatrist on Guam. As noted by CDR Voge's attorney in his letter of 3 Dec 90 "succumbing to command influence in matters of psychiatric diagnostics (sic) is a grave breach of professional ethics." The statements appear to rely on innuendo in that there has apparently been no professional society complaint or request for investigation initiated. Further, as the number of independently licensed professionals involved in an evaluation increases it would become less likely that such a breach could occur.

(3) "Rebuttal of NAMI psychiatric evaluation dtd 1 Oct 90". This is a line item review of the report with rebuttal comments.

Comments: The rebuttal comments offer nothing that would be evidence that the evaluation was inadequate or unprofessionally conducted.

There are some corrections to the history that are to be expected in such a lengthy report. However, taken singly or as a whole, the corrections would not change the result of the evaluation.

Recollections and phrasing about information may be expected to vary. As an example CDR Voge notes in her "sequence of events" memorandum that on 29 Aug 90 "I opined one cannot be honest and succeed in the Navy." The psychiatric report relates that CDR Voge said ". . . that 'all Navy senior officers' were dishonest." In her rebuttal CDR Voge recalls that she ". . . did say all senior Navy officers I KNOW (which are relatively few in number) are dishonest. That would be an accurate statement." Such differenc-

es do not generally affect the outcome of a psychiatric evaluation nor do they appear to have affected the outcome of this evaluation.

CDR Voge's focus on CAPT Baggett in the rebuttal does not adequately reflect the involvement of the rest of the NAMI team in the evaluation process.

d. In summary comment, the evidence submitted in support of the application offers nothing substantive to show that the psychiatric evaluation at NAMI was improperly or unprofessionally conducted.

4. Separate from the evidence submitted by CDR Voge in her petition should be the question of whether or not a reasonably prudent psychiatrist could have made the diagnosis of personality disorder based on the examination and information available.

a. This requires review of the diagnostic criteria provided by the Diagnostic and Statistical Manual of Mental Disorders (Third Edition—Revised) (Hereafter DSM-III-R) that should have been utilized as well as a review of previous examinations.

(1). DSM-III-R offers diagnostic criteria for mental disorders as "guidelines" reflecting a consensus of current formulations in psychiatry. The introductory section on Personality Disorders notes that:

"Personality *Traits* are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of important social and personal contexts. It is only when *personality traits* are inflexible and maladaptive and cause either significant functional impairment or subjective distress that

they constitute *Personality Disorders*. The manifestations of Personality Disorders are often recognizable by adolescence or earlier and continue throughout most of adult life, though they often become less obvious in middle or old age.

The diagnostic criteria for the Personality Disorders refer to behaviors or traits that are characteristic of the person's recent (past year) and long-term functioning since early adulthood. the constellation of behaviors or traits causes either significant impairment in social or occupational functioning or subjective distress."

(2) It must be noted that only one parameter distinguishes between personality traits and personality disorders—the personality disorder must cause significant impairment. There are however, no specific criteria as to what constitutes significant impairment and judgment may vary. This is inherent in the clinical context. Historical information as to onset of problems is often difficult to acquire in a manner that is accurate and unbiased by the patient's current circumstances. There should also be noted the requirement that the behaviors or traits must reflect long-term functioning since early adulthood to constitute a personality disorder.

(3) The question underlying whether a prudent psychiatrist could make a diagnosis of personality disorder can be phrased as "Could a reasonably prudent psychiatrist have formed the judgment that CDR Voge's behaviors or traits caused significant impairment in social or occupational functioning?"

b. A review of the record reveals the following:

(1) CDR Voge had a psychiatric evaluation by LCDR Eugene Tinelli at USNRMC Guam with report dated 12

April 1982. The report documents concisely and specifically the behaviors leading up to the evaluation, the past history, the mental status examination and the diagnostic impression. The diagnostic impression was of Paranoid personality. (The diagnosis in 1982 would have been made under DSM-III criteria.) The opinion section spells out why the judgment was formed that the impairment manifested by CDR Voge was judged to be significant. The recommendation was for evaluation and recommendation by the Psychiatry Department at NRMC San Diego.

(2) Dr. Tinelli authored a letter to CDR Voge's attorney dated 30 Oct 90. In that letter he says he is still angry that ". . . the command on Guam was never notified that there were any prior problems concerning Dr. Voge's behaviors . . ." He does not say that he considers his diagnosis to be in error. He does state that question could be best evaluated by " . . . observing how she has performed during the past nine years." In retrospect he feels that he would prefer to have described her oversuspiciousness and behavior in a narrative form and deferred diagnosis pending referral for evaluation. He does not say that the oversuspiciousness and behavior were not significant. Nothing in this letter indicates any basic change in the clinical data.

(3) A medical board report dated 12 May 1982 documented the report of a psychiatric evaluation performed at NRMC San Diego. During that evaluation psychological testing was performed and "revealed an insecure, conventional, and indecisive woman who represses or denies her feelings." A major area of difficulty at that time was noted to be "extreme indecisiveness" which was exaggerated to the point of sometimes being unable to reach a decision and instead "she hedges her answers with disclaimers rather than making any clear statement."

Additionally "hysteroid characteristics" where noted where she tended to "lose control over her emotionality and to react with overt behavioral expression when under stress and tension." CDR Voge was diagnosed with "hysteroid and obsessive-compulsive character traits which tend to get her into trouble at times of crisis". This evaluation documents personality traits which created impairment but which were apparently not thought to have sufficient historical documentation as to presence for sufficient time to make a diagnosis of personality disorder. The board itself is not clear on this point. The problems noted would otherwise appear to have been "significant" enough to include in the formal board report.

(4) CDR Voge had a psychiatric evaluation performed at Fort Dix, New Jersey with report dated 8 Feb 89. That report relates the information noted above and noted subsequent "occupational difficulties" in assignment at NAS Corpus Christi as well as a "phobia" of water which developed in 1984 and required treatment. The psychiatrist included a discussion as to what constituted significant impairment while noting that ". . . whatever reality exists in her being labeled a 'trouble maker' sets up a self-fulfilling prophecy in each new assignment . . .". Given those considerations he made a diagnosis of personality disorder.

(5) The subject psychiatric evaluation at NAMI relates with specificity the patterns of behavior of CDR Voge that have been present since 1981 and the occupational difficulties that have resulted. In addition to previous occupational difficulties it outlines problems after assignment to the Naval Air Development Center. The behavioral observations made by the team during the evaluation process are consistent with the difficulties noted by the previously reported difficulties in occupational functioning. The results of psychological testing showed areas of

difficulty not dissimilar from previous testing in the past. The summary paragraph of the report specifically outlines the maladaptive behaviors and traits and delineates why they constitute significant impairment.

c. Based on the information available it is my opinion that a reasonably prudent psychiatrist could have formed the judgment that the behaviors and traits reported caused significant impairment in occupational functioning and in occupationally related interpersonal relationships. It is also my opinion that a reasonably prudent psychiatrist could have made the diagnosis of personality disorder based on that judgment, on the examination, and on the historical information available.

Very Respectfully,

/s/ J. Mateczun
J. MATECZUN

Copy to:

Chief, Bureau of Medicine and Surgery (MED-25), Washington, D.C. 20372-5120

The University of Texas
Health Science Center at San Antonio
7703 Floyd Curl Drive
San Antonio, Texas 78284-7792

Medical School
Department of Psychiatry

July 2, 1992

Mr. Eugene R. Fidell
Attorney at Law
Feldesman, Tucker, Leifer, Fidell & Bank
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036

Dear Mr. Fidell,

On June 17, 1992, I conducted an Independent Psychological Evaluation with Virginia Voge, M.D., one of your clients. I understand that Dr. Voge has an application pending with the Board of Correction of Naval Records, docket No. 14, 033-90 and that this IPE and perhaps others as well may be used in support of her application. I explained to Dr. Voge that my task as an Independent Psychological Evaluator would be to gain as fair and impartial an understanding of her as I could and could, in no way, guarantee that the evaluation results would be favorable to her in her quest for a correction of her Naval records. She indicated that she understood this condition of the evaluation and agreed to participate fully and to the best of her ability to disclose information about herself which would characterize her fairly and accurately. We met for slightly more than five and one-half hours and she indeed appeared to live up to her contract. She was cooper-

ative and forthcoming.

I understand that in cases such as this there is no, or very slim, opportunity for Deposition to clarify whatever opinion is expressed. Therefore, this report will be quite detailed. I apologize for its anticipated length and hope that the informational content will be sufficiently substantive to warrant the time and effort of reading. I have tried to be fair and impartial as an "Expert" consultant and am prepared to testify in whatever format is ordinary and customary in such matters in the hopes of being of service to all parties involved. I will give my considered opinion with regard to the psychological state of Dr. Voge and, at your request, will also comment on the documents listed below in areas within my purview of training and expertise as they pertain to the important issues of this matter.

As Director of the Psychodiagnostic and Neuropsychology Laboratory, I evaluate approximately 250 individuals per year with the psychological test instruments used in this case. I have evaluated more than 2500 individuals since 1982 when I assumed this position and from 1971-1982 evaluated 2500 or more persons in other professional capacities. I teach and supervise psychodiagnostic can neuropsychological appraisal on a daily basis to psychology and psychiatry residents and to medical students. I am reasonably confident that my prior training and professional experience in conducting evaluation has prepared me to offer an opinion in the matter at hand. I am a duly-licensed Psychologist in the State of Texas (#916), hold the Diplomate (#3101) in Clinical Psychology from the American Board of Professional Psychology, am a licensed Health Service Provider (#10015) in Texas and the United States, was granted a Ph.D. in Clinical Psychology from the University of Tennessee in 1971, was tenured as an Associate Professor in 1978, and since 1986 have been a tenured

Professor in the Department of Psychiatry, UTHSCSA. My professional resume is attached for additional information concerning my professional background and accomplishments. I have been a testifying consultant in 25 cases involving legal matters providing written reports in every case. I have been deposed 3 times.

This IPE was conducted using an unstructured clinical interview which covered the essential details of Dr. Voge's current predicament with the U.S. Navy, her current occupational and marital situation, her developmental and family-of-origin history, her educational history; and four psychological tests, all of which are ordinary an customary evaluation instruments utilized by myself as Director of the Psychodiagnostic and Neuropsychology Laboratory at the University of Texas Health Science Center to San Antonio and all accepted by the professional community as ordinary and routine. The tests were unstructured (Murray's Thematic Apperception Test and Rorschach's Inkblot Test), semi-structured (Sach's Sentence Completion Test) and structured (Cattle's Clinical Analysis Questionnaire) Procedures purported to reveal important aspects of personality functioning and allowing conclusions to be drawn with reasonable psychological certainty with regard to personality characteristics and traits and presence of personality disorder.

In addition to the five and one-half hour face-face encounter with Dr. Voge, prior to seeing her, I had reviewed carefully, and in detail, three documents which were provided by your office June 2 by Federal Express. These documents were: (1) a 9-17-90 Psychological Report written by Ralph McMillan Turner, Ph.D., Professor and Director of Psychiatry Outpatient Services, Temple University, Philadelphia. This report was drawn after Dr. Turner's six-hour IPE of Dr. Voge on 8-17-90; (2) a letter dated 10-30-90

from Eugene T. Tinelli, M.D. to yourself in which he apparently was trying to explain the context of Psychiatric Services in Naval Hospital, Guam, circa 1980-1982 and in which he regretted the psychiatric diagnosis which he applied to his observations of Dr. Voge during that time frame; and (3) a Memorandum 6000.16 dated 1-21-92 from Capt. J. Mateczun, MC, USN, Specialty Advisor for Psychiatry, Camp H.M. Smith, HI to the BCNR wherein he detailed an Advisory Opinion ICO CDR Victoria M. Voge, MC, USN 040-58-0657 2100. Subsequent to my evaluation of Dr. Voge, I also had opportunity to review other records which Dr. Voge provided (at my request for any other records which might shed light), concerning results and conclusions of other psychiatric or psychological evaluations conducted either independently or by Naval personnel. These records consisted of: (4) a Medical Record Narrative Summary dated 4-12-82 signed by Eugene T. Tinelli, LCDR MC USN; (5) a Report of the Medical Board, Naval Regional Medical Center, San Diego, California, dated 5-13-82 and signed by R.I. Ridenour CDR MC USN and C. Floyd LT MC USNR reflecting their conclusions drawn from a psychiatric evaluation of Dr. Voge conducted while she was hospitalized for such a purpose from 4-13-82 to 5-12-82 in San Diego; (6) a one page Consultation Sheet dated 4-27-82 reflecting the opinion of a Psychology Intern (B. Harbinger, Ph.D.) and signed by her supervisor (H.W. Nathan, Ph.D., LCDR MSC USN) based upon her evaluation of Dr. Voge while she was hospitalized; (7) a rebuttal of the report of the Medical Board report, undated, but singed by Dr. Voge; (8) a Report of Psychiatric/Psychological Evaluation dated 2-8-89 singed by Richard L. Gushwa COL MC, C, Dept. of Psychiatry, Fort Dix, NJ containing his conclusions based upon an evaluation of Dr. Voge conducted on 2-2-89; (9) a 26 page report dated 5-22-89 signed by Suzanne M. Reeps, Technical Advisor and Captain F.K. Helmsin USN entitled INVESTIGATION TO INQUIRE INTO THE CIRCUM-

STANCES SURROUNDING ALLEGATIONS OF FRAUD, SAFETY VIOLATIONS, HARASSMENT, PERSONALITY CONFLICTS, AND SUCH OTHER INCIDENTS POTENTIALLY REQUIRING CORRECTIVE ACTION WHICH ARE REPORTED IN A LETTER OF REQUEST FOR REDRESS DTD 16 FEB 89; (10) a First Endorsement on the Helmsin document dated 7-26-89 from C.J. Winters, Commander, Naval Air Development Center, Warminster, Pennsylvania to the Judge Advocate General; (11) a Second Endorsement on the Helmsin document dated 11-17-89 from John C. Weaver, Rear Admiral, USN, Commander, Space and Naval Warfare Systems Command, Washington, D.C. to the Judge Advocate General; (12) a Medical Record Consultation Sheet containing an 8 page Psychiatric Report dated 6-22-90 by NADC Flight Surgeon LT. R. Hamilton to NAMI Psychiatry and returned from NAMI to the referring physician dated 9-4-90 by W.A. McDonald LCDR MC USN, Jeffrey L. Moore LCDR MSC USN, and J.C. Baggett CAPT MC USN; (13) a two-page hand-written, psychiatric progress note dated 8-30-90 taken from the Health Record of Dr. Voge and signed by J.C. Baggett CAPT MC USN, Aviation Psychiatry; (14) an 8 page document by Dr. Voge entitled "BRIEF SUMMARY OF EVENTS DURING MY NAMI EVALUATION (27 AUGUST to 30 AUGUST 1990)", unsigned and undated; (15) a one page statement dated 11-18-90 signed by W.A. Buckendorf, Assistant Chief for Fleet Readiness and Support, Bureau of Medicine and Surgery, Washington, DC to Commander, Naval Military Personnel Command regarding QUALIFICATION FOR DUTY INVOLVING FLYING IN THE CASE OF VICTORIA M. VOGE, USN, 040-53-0657; (16) a two-page letter from James R. Hickman, Jr. COL USAF MC CFS to Jerald L. Ulmer, CDR MSC USN Officer in Charge, Naval School of Health Sciences, Fort Sam Houston, Texas regarding Commander Victoria M. Voge, 040-58-0657; (17) a two page letter dated 4-8-92 from George E. Schwender, M.D., COL

USAF MC, CFS, Commander to Jerald L. Ulmer regarding Hickman's letter to Ulmer, (18) a three-page Memorandum for the Record dated 4-29-92 signed by James R. Hickman; and (19) a two-page concluding opinion for the record dated 6-9-92 singed by James R. Hickman to Ulmer.

A brief review of the family and academic history of Dr. Voge is in order. Victoria Voge was born 6-27-43, the second of three full siblings, with a 1-2 year older brother and a 9 year younger sister. Older brother was described as an extension of their father who would report on his sister whenever he thought his father should know about her actions or attitudes. He was given caretaking authority for her, even throughout college, and would handle her money and drive her to and from college classes. He also became a physician and practices in Mexico. The sister was diagnosed with laryngeal cancer at a very young age, was treated oncologically with minimal residua, and received favored treatment from her parents because of her frailty. Victoria was not allowed to date throughout college and began to do so only after her father's death after she had enrolled in Medical School. Her friends were few, consisting almost solely of girlfriends, and dedicated to academic achievements. She felt most loved when she accomplished academically and her father showered her with praise. She graduated from Mounds View High School, New Brighton, Minnesota ranked in the top of four of more than 200 students. She completed the University of Minnesota with a BA in pre-med in only three years and was on the Dean's List (top 10%). Her father retired to Mexico and insisted that all of his children accompany him, despite his son having completed one year at the University of Minnesota Medical School and Victoria's acceptance for enrollment there. She attended and completed her medical training at the National Autonomous University of Mexico in 1971 ranked in the top 100 of a class of more than 2000. In 1972

she was commissioned into the United States Navy, one of only two females in her Flight Surgeon class of 1973. She passed the ECFMG and the FLEX on her first attempt, is licensed to practice Medicine in 5 states, Virginia, Maryland, Pennsylvania, New Jersey, and Florida, and is Boarded in both Aerospace Medicine and Occupational Medicine. She has earned the M.PH. from Johns Hopkins and a second M.PH from the Medical College of Wisconsin. She married a Navy career man in 1976 and they attempted to juggle two Navy careers until his retirement. He now is a gentleman rancher in south Texas where both reside as she is now stationed in San Antonio, Texas. They have no children of their union as he had previously had a vasectomy following the birth of his fourth child from a previous marriage.

In 1979, Dr. Voge was assigned to the Naval Safety Center as an O4 Flight Surgeon under an Admiral Warwick. She was placed into the position of Head of the Aeromedical Division following the firing of an O6, who had held the position. She claimed that she was head of the team which was given specific instructions by her Admiral which she carried out to the letter with the assistance of her team. She signed all reports once they were compiled and double-checked for accuracy. These reports were statistical and narrative evaluations of all Navy aircraft mishaps and Safety Surveys critiquing Navy supervision of pilots and other personnel as alcohol, drugs, fatigue were implicated in an inordinate number of accidents, with the further implication that this information had been known previously and had either been ignored or covered up by her predecessors. Her Admiral apparently was insistent in running the Safety Center in a manner such that the veracity of any document emanating from the Center could not be impeached. Allegedly, he was fully aware of the actions of Dr. Voge and accepted the reports of herself and

the team. She described herself as very naive during her early Navy years. She was one of the first two female Flight Surgeons in the Navy and was very concerned about doing a good job. Her surveys showed that the turnover rate for Navy Flight Surgeons after one tour exceeded 95% and that the morale was very low for those whom she surveyed. The other female left the ranks of Flight Surgeons prior to 1980 for other branches of Medicine, specialty Hematology Pathology and then some other specialty. When the reports which she signed off on caught the attention of the Bureau of Medicine and surgery, the Navy was apparently embarrassed and very unhappy with her. She feels as though she was scapegoated as retribution for her apparent criticism of negligent supervision of Navy personnel and her adaptational problems began. She was removed from her position at the Naval Safety Center (Admiral Warwick may also have been removed, but my memory fails me here) and assigned to Guam where she believes a reputation concocted for her and preceded her to this assignment. She believes that following her tour at the [NSC] she never had an opportunity to work in a neutral setting as she had been tagged a "trouble-maker" and "not a team player".

In Guam she soon came to the attention of Eugene T. Tinelli, M.D., a Navy psychiatrist. She claims that Tinelli later admitted to her privately that he had been ordered to give her a psychiatric diagnosis, apparently as part of a retribution collusion. Tinelli denied this allegation in a letter to Fidell dated 10-30-90. Tinelli describes the "Chief Complaint" which framed his evaluation as "command initiated" and justified by a series of "occupational interpersonal difficulties" within the first two months of her assignment as "Director of the NAS Branch Clinic". His report indicates that "a number of her administrative and medical decisions were called into question" and that she was "questioned about specific incidents by the Command-

ing Officer and Director of Clinical Services". She apparently refused to acknowledge wrongdoing and insisted on administrative authority consistent with her rank and position. She was ordered to see Tinelli and he was to accomplish an evaluation of her mental competency and, apparently, her fitness for duty. She declared her theory of prejudicial treatment at the behest of BUMED which she thought was responsible for her assignment to Guam and to the "discriminatory" treatment she received from time of arrival. Tinelli rendered an opinion that the NAS clinic had "deteriorated from an integrated and functioning unit to almost total demoralization and chaos" in the space of the 5 months following Voge's arrival. He implicated the blame for his alleged state of affairs squarely upon Voge and concluded that her theory was evidence of a Paranoid Personality Disorder and that she was oversuspicious, hypervigilant, and had restricted affectivity. He asked for a second opinion and she was sent to NRMC San Diego for an inpatient hospitalization and evaluation. In Tinelli's 10-30-90 letter to Fidell, he acknowledges that he was "still angry towards some unidentified personnel in the United States Navy who were responsible for sending Dr. Voge to Guam". He agreed that with hindsight he was able to see that she had "stepped on some higher ranking officer's toes" (in her previous command), and that the "end effect was to send her . . . overseas to Guam. This is an age old military tradition".

Tinelli admits in his 10-30-90 letter to Fidell that "with the clarity of almost a decade of hindsight, I would not diagnose her with Paranoid Personality" and wishes that he had deferred her diagnosis at that time. He recognizes implicitly that the characterization as Paranoid was the label which preceded her into every psychiatric encounter she was to have subsequently. What is remarkable to me is that Tinelli did not in 1982, nor did he acknowledge

in 1990, any realization that Dr. Voge may have been traumatized by her removal from her prior to command and that she might actually have been quite depressed upon her arrival in Guam. As will be noted later with regard to subsequent evaluations of Dr. Voge, people who have Obsessive-Compulsive characteristics, as she has been shown to have, not uncommonly regress into "paranoid" stances when they are depressed and it is not until the underlying motivation and demoralization is discovered that a truer understanding of the person is possible. Tinelli may, for reasons only he may know about, have been preoccupied with what he considered to be the phenotypic expression (i.e., the alleged paranoia) and may have been negligent in his diagnosis of the genotype (i.e., the probable depressive disorder). Although she probably would have not have met strict requirements for the diagnosis of Post-traumatic stress disorder upon her arrival to Guam, she probably was traumatized sufficiently by her experience at the Naval Safety Center that a diagnosis similar to PTSD, or Reactive Depression, or Adjustment Disorder with mixed emotional features, or some such similar characterization should have been an obvious consideration. Why the Guam command, characterized by Tinelli as a "family", could not recognize that this new family member may have ben traumatized on arrival, and chose instead to see her as paranoid and destructive, is a mystery to be considered more thoroughly.

Dr. Voge was sent to San Diego, California and was hospitalized at the Naval Regional Medical Center for a three week (4-18-82 to 5-4-82) period of observation to evaluate more thoroughly Dr. Tinelli's appraisal of her as having a Paranoid Personality Disorder. The medical report indicates that she was "examined, observed, and evaluated in individual, group, and milieu settings". Their bottom line was "No diagnosis or condition on Axis I, #V710.9", and "The Medical Board agrees with the above findings and is

of the opinion that the patient at the present time is considered psychiatrically fit for return to full duty", and "she is now psychiatrically fit for full duty as she does not evidence any disabling psychiatric condition". In this report, an observation of obsessive-compulsive character traits was noted.

Dr. Voge was "decredentialed" administratively in Guam and was sent to Brooks AFB, San Antonio, Texas for "retraining". From San Antonio, she was sent to NAS Corpus Christi, Texas, and from there to NADC Warminster, Pennsylvania. Apparently, her CO (a CAPT Maroney) made several trips to Washington, DC (NMPC) where he sought to have Dr. Voge's assignment to Warminster cancelled and diverted to another location. Maroney cited Dr. Voge's "poor service reputation" as justification for his request. He was unsuccessful and an apparently nightmarish experience ensued after her arrival to NADC 4-6-88, once Dr. Voge had made the acquaintance of Dr. James E. Whinnery (a person allowed "to assume and execute the full duties of a flight surgeon with management's knowledge, although he was not properly credentialed"). The Helmsin document (#9 listed above) characterizes the enormous interpersonal struggle between Whinnery and Voge (perhaps also fairly characterized as an attack of Whinnery on Voge) and cites that Whinnery wrote 98 memos in 8 months regarding Dr. Voge and that "Most of these attacked her personally and recommended severe discipline for minor issues". What is apparent to me from reading the Helmsin document was that Voge was never welcome in Warminster and that occupationally she was assigned to an intolerable situation, reporting to an officer who was junior to her, who was not properly credentialed, who apparently had a reputation of bias against females, and who may have engaged in a pattern of harassment against her. The end result of this hellish period of time is

that Voge is ordered by Maroney to submit to another psychiatric evaluation. Maroney arranged an appointment for Dr. Voge with COL R.L. Gushwa at Walson Army Hospital, Fort Dix, New Jersey for 2-2-89. Subsequent to the appointment and submission of the Gushwa report, Maroney calls Gushwa and thanks him for his efforts, telling him that his report will "meet his purposes". What was apparent to Helmsin, as documented in his OPINIONS (pp. 24 and 26), was that: A) Code 60 management "created a highly unstable work environment fueled by rumor" by failing to take certain preventative and corrective actions which he outlines; B) that "events subsequent to the 25 July 1988 meeting between Dr. Whinnery, LCDR Singer, LT Bennett, and Mr. Pasles were in effect collusion between Code 60 management and Dr. Whinnery to get rid of CDR Voge"; C) that the work environment which existed on Voge's arrival was "casual" and "undocumented"; and D) that "Captain W.F. Maroney be formally counselled in writing regarding the need to more closely monitor personnel issues, to judge the issues on their merit (not a person's reputation) . . ."

Dr. Gushwa was unaware of the Helmsin document as it was prepared 5-22-89 and his evaluation was conducted 2-2-89. He admits in his report that "there were several paradoxical, conflicting, and perplexing issues", yet he does not describe what were these issues. He concludes that a "mixed personality disorder was readily evident" and characterizes this alleged disorder as "301.90, personality disorder NOS (not otherwise specified) with mixed features of paranoid, obsessive-compulsive, and narcissistic features, moderate severity. LOD EPTS. Not service aggravated". He instructs the reader that "personality disorders are by definition well formed by mid-adolescence and are so in flexible and maladaptive as to cause *significant* functional impairment in social or occupational functioning of subjec-

tive distress". He does not specify which, if any, of the diagnostic requirements for 301.00 (paranoid personality disorder) or 301.40 (obsessive compulsive personality disorder) she may have met, yet he claimed that he felt she met a sufficient number for both, and that this was "readily evident". He does not track any characteristic to "mid-adolescence", yet is himself perplexed that Dr. Voge's accomplishments in life are considerable and well beyond that of which most personality disordered persons are capable.

Certainly with the benefit of the Helmsin document the poverty of the Gushwa evaluation is exposed, but even without the Helmsin document, it is nonetheless apparent as a remarkably shoddy piece of work. No other alternative, possible explanation for the occupational circumstances which precipitated the reason for his involvement in the case at hand was considered, except for the possibility that Dr. Voge was personality disordered, and so maladaptive as to create an intolerable work environment. His claim that her alleged personality disorder was "not service aggravated" borders on the ludicrous and raises the suspicion that he was merely a pawn of an institutionalized bias against Dr. Voge and that he failed to protect his patient against abuse which may have been being inflicted upon her. His ethical requirement to "first do no harm" appeared to have gone unheeded as he wielded the axe of Psychiatry to justify what might be construed as administrative tyranny against a patient who placed her trust in him to perform his duties as a physician. Certainly in retrospect, with the Helmsin document as evidence, medical negligence in diagnosis is certainly a possibility
here.

The next psychiatric evaluation to which Dr. Voge was required to submit was a four day event (8-27-90 to 8-

30-90) at NAMI, apparently ordered as a direct outcome of the Gushwa evaluation. According to the NAMI report, it is apparently consistent with the policy for Navy aviation personnel with diagnoses of maladaptive personality style or personality disorders for the NADC Flight Surgeon to request NAMI consultation. Apparently, this is what Maroney meant when he telephoned Gushwa to thank him for his report as it served his purposes with regard to Voge. At NAMI, over a four day period of time, Voge was interviewed on multiple occasions and/or tested by "two psychiatrists, one clinical psychologist, one neuropsychologist, and two Aerospace Medicine Residents", and she underwent a "full neuropsychological test battery". She was identified as a psychiatric "patient" who carried a presumptive psychiatric diagnosis of "Paranoid personality disorder" and her behavior was apparently viewed from the bias that it was her burden to disprove allegations of "personality disorder" which caused her occupational difficulties. The NAMI team declares that the evaluation was conducted because of a "persistent maladaptive personality style primarily manifested by her tendency to become embroiled in details and an inflexibility of decision making that prohibits a common sense application of rules and regulations". Nowhere in the report is it apparent that the NAMI evaluation team assumed that any other explanation for Dr. Voge's occupational predicament was considered. No other persons were evaluated except for Dr. Voge and no attempt was made to check the veracity of her claims of prejudicial treatment against her in the work place. Her conundrum was then, and is still, of having to prove her sanity in insane circumstances.

Nonetheless, despite the obvious conceptual biases which framed the evaluation for the NAMI team, despite the bombardment over four days of "multiple clinical interviews", a "full neuropsychological test battery", and,

presumably, full testing by a clinical psychologist, the bottom line is that the NAMI team convincingly considered and ruled out paranoid personality disorder, just as had the NRMC team done in 1982 after an even longer period of hospital-based observation. The NAMI team concluded "Personality Disorder NOS, 301.90", with "Narcissistic and Obsessive-Compulsive Features manifested by sense of entitlement, perfectionism that interferes with job completion, preoccupation with details, rules and organization and unreasonable insistence that others submit to exactly her way of doing things and excessive devotion to work to the exclusion of leisure activities, over-conscientiousness and inflexibility and restricted expression of affection". What is remarkable in this conclusion is that it represents a tautology, i.e., the occupational difficulties are taken, on their face, as evidence for the alleged condition which is claimed to have produced them. The NAMI team has not developed a profile of interview or test data which supports the claim of personality disorder independently of the real world data of occupational turmoil upon which they are so dependent for their conclusions. Would they have come to the same conclusion on the basis of their interview or test data alone, without the prejudicial influence of the extra-clinical data, the validity of which they never confirmed? Would they have been so confident, even arrogant, in their opinion if they had had the Helmsin document to consider? Based upon my years of collecting this sort of data, and trying to read between the lines of their professional jargon (i.e., the last few lines of their diagnostic conclusion), I would say that they could not and would not have.

Just prior to the NAMI evaluation, Dr. Voge sought the services of Ralph M. Turner, Ph.D., a Professor of Psychiatry and Psychology at Temple University at Philadelphia, Pennsylvania, for an Independent Psychological Evaluation. Dr. Turner interviewed and tested Dr. Voge

over a 6-hour period of time. The conceptual frame which he adopted for his evaluation apparently was much different than that assumed by the command-ordered personnel. He stated that since 1978-81, "it appears that the Navy has attempted to utilize psychiatric reasons for sabotaging Dr. Voge's career". He conducted an evaluation consistent with the professional standards which reasonably competent and licensed psychologists are expected to comply. He also explicitly ruled out paranoid personality disorder and further claimed that Dr. Voge did not meet criteria for any psychiatric disorder or personality disorder. He even went on to say that "Dr. Voge is singularly one of the most psychologically healthy individuals the examiner has ever met". He then went on to list her attributes; intelligence, dedication to work and family, dedication to the military establishment, strong moral convictions, appropriate sex role adaptation, integrity, and the capacity to withstand prolonged emotional hardship".

The BCNR asked BUMED for an advisory opinion in the case of Dr. Voge and CAPT J. Mateczun MC USN, Specialty Advisor for Psychiatry, replied. Dr. Mateczun reviewed certain documents not including the Helmsin report, which were supplied by BCNR. He never met Dr. Voge. His bottom line was "Recommend the request for removal of the NAMI psychiatric evaluation from the Navy's records be denied" and "it is my opinion that a reasonably prudent psychiatrist could have formed the judgment that the behaviors and traits reported caused significant impairment in occupational functioning and in occupationally related interpersonal relationships . . . (and) that a reasonably prudent psychiatrist could have made the diagnosis of personality disorder based on that judgment, on the examination, and on the historical information available". His seven page report can best be described as an adversarial document advocating the rightfulness of the Navy

and discrediting the Turner report as biased, not performed by a psychiatrist, and therefore did not merit "value". In interesting juxtaposition, he gave considerable attention (item 4-b-3 in his report) to a critical report written by an unlicensed psychology intern in 1982 (with no documentation in the original medical report as a whole that this intern had been adequately supervised in either the conduct of her examination or in the writing of her report or that her supervisor who signed off on the report had ever seen the patient who was being described), who produced the psychological test-based findings which are cited in every subsequent psychiatric evaluation of Dr. Voge. This is but one glaring example of how the Mateczun document is adversarial in nature, unbalanced, biased, and prejudiced only to exonerate the actions of the Navy and discredit any claim which Dr. Voge may make on her behalf either herself or through an independent evaluator.

Finally we come to my IPE of Victoria Voge conducted over a 5 and one half hour period of time on 6-17-92 in my office at the University of Texas Health Science Center at San Antonio. Prior to seeing Dr. Voge, I had talked by telephone with her attorney who outlined the position of his client. He stated that his client was seeking to have her Navy personnel file changed because she felt she had been maligned. He stated that the occupational difficulties she was having were experienced only in Navy commands and not in Air Force commands. I had also talked with Dr. Terence McGuire, who had originally referred Dr. Voge to me. He related that the case was complicated and there he had no information except that provided to him by Dr. Voge in a brief telephone conversation. I had worked with Dr. McGuire on numerous other occasions requiring psychological test-based opinions, usually of pilots for whom a question of fitness for duty had been raised.

Dr. Voge was a few minutes early for her appointment and waited quietly and patiently for her appointment to begin (which was a few minutes late). She was in uniform, looking very tailored and fresh. She was matter of factual in relating her history, essentially apologizing for having to rehash information which would appear in various forms in the records I would subsequently examine. She claimed that the prior 11 or so years have given ample reason and opportunity for self-examination and her presentation had a rehearsed quality, as if she had been over this psychological terrain so often that it was now very familiar territory. She recognized, however, that the personal stakes were very large and that much of the meaning of her life now centered around being vindicated in her quest. Therefore, she was prepared to do what she had to do to be understood, and that included spending whatever time with me I considered necessary and sufficient. She was alert, cooperative, personable, and indefatigable. Even when I became confused or weary of the bureaucratic concatenations she described, she would very patiently walk me through the details of her account until I knew who the major players were and what roles they played in her professional life. Her psychomotor level of activity was appropriate to the circumstance and no problems in motor expression (language or movement) were observed. Her mood was generally euthymic, but occasionally she would become tearful as she described painful memories or the weariness she felt in defending herself in what sometimes seems like a hopeless battle. Her affect was of full range and was appropriate in intensity and fit to the content of discussion. She was alert, sustained her attention to the tasks at hand, demonstrated no difficulty in remembering sequences of events, important persons, or other items of general orientation. Her intelligence was clearly of at least an average level and, if tested formally, it would not surprise if it were to be significantly above

average. Her thought process was logical, clear, and goal-directed. She was not hesitant to express opinion, but was cautious not to overstate claims based on limited information. The content of her thought reflected the content of the conversation and she varied little into areas not akin to the discussion at hand. She described her husband and their ranch in warm terms, but declared that she wished her husband was more consistently affectionate. She looks forward to retirement in the coming few years after her situation is resolved and to a new civilian career in Occupational Health and Safety Medicine and consultation.

Her responses to the CAQ, the most structured evaluation device and that most amenable to manipulation of self-presentation, described a person who was interested in people and the world outside herself, adaptable, realistic, self-reliant, responsible, well-integrated, well-adjusted, and optimistic. None of the scales suggesting psychopathy was increased and she described herself as having few somatic complaints, contented, composed, energetic, untroubled, relationship-seeking, reasonable, reality-oriented, noncompulsive, and feeling as if she was competent and had a sense of self-worth. The only scales outside this description were scales suggesting a craving for excitement and freedom from inhibitions. These two scales, in my experience, often reflect the excitement pilots crave and feel when they are unfettered in their aircraft from ordinary earth-bound concerns. Her responses to the SSCT were grammatical, syntactical, and appropriate to the stem. Spelling problems were not observed and she was not extraordinarily careful in editing or writing her responses. She described herself as achievement oriented, confident in her abilities, energetic, hard-working, and like a "mother hen" to her family members. She described her father as strict, rigid, and seldom having fun. She described her mother as dependent and as having made mistakes, but as a person she

loved. Responses to the unstructured tests are least amenable to self-presentation manipulations. Stories told in response to ambiguous pictures reflecting interpersonal situations or individuals in isolation reflected a painful effect that she doesn't belong and is an outsider looking in, a painful affect that she cannot admit to weariness or depression and that she must carry on no matter what, and a painful affect that she is duty-bound and most forsake personal gratifications to comply with the demands or needs of others. Responses to the least structured test, the inkblots, suggested a central, painful affect that she varies in her self-evaluation as someone beautiful and worthy of love to someone who is not valued and perhaps may not deserve to be so. Her responses otherwise were normative, structured, and appropriate to the stimulus materials.

My opinion of Dr. Voge's personality structure is that it is composed primarily of Compulsive attributes. Her behavioral presentation is disciplined. She maintains a life pattern which is highly organized, regulated and structured. Her interpersonal conduct is respectful. She adheres to social convention and properties and prefers polite, formal and correct personal relationships. Her cognitive style is constricted. Her expressive mood is usually solemn and she restrains her warm feelings. Her primary unconscious mechanism is reaction formation. She displays reasonableness and maturity when faced with circumstances that evoke anger or dismay in others. Her self-image is conscientious. She sees herself as industrious, reliable, meticulous and efficient. Her internalized content is concealed. Only those inner affects and attitudes which are socially approved are allowed conscious awareness and behavioral expression. Self-gratification is highly regulated.

It is my considered opinion that Dr. Voge does not now meet diagnostic requirements for any psychiatric

disorder or disease, including personality disorders, promulgated by the American Psychiatric Association in their Diagnostic and Statistical Manual III-R. It is highly doubtful that she at any previous time has met diagnostic requirements for any psychiatric disorder, although she may have met partial requirements in 1982 for a diagnosis of post-traumatic stress disorder, or reactive depression, or adjustment disorder with mixed emotional features, suffered as a result of her removal from her position at the NSC. These disorders, should any of them had [*sic*] been present, would have been the direct effect of a military service aggravation as they would have been responses to actions taken against her by Naval command for reasons known only to Naval command. Nowhere in the data I collected is there a shred of evidence for Paranoid Personality Disorder as suggested by Tinelli, but later refuted by Tinelli, and ruled out in every subsequent psychiatric evaluation since first advanced by Tinelli. Nowhere in the data which I collected is there evidence for Narcissistic Personality Disorder as suggested by Gushwa and carried along as "traits" by other psychiatrists in their opinions which were formed without benefit of the Helmsin document and without verification of any of Voge's claims regarding BUMED actions against her as a result of her performance at [NSC]. Nowhere in the data which I collected is there evidence for "hysterical" traits as suggested by an unlicensed, and possibly very poorly supervised, psychology intern.

What is quite remarkable and impressive to me after sifting through the documentation available to me (and I understand there may be more) is that not one of the command psychiatrists or psychologists ever considered the possibility that Voge was not personality disordered and that her presentation might be better understood in some other context than that promoted by Naval command.

Every one started with the premise that Voge was disturbed, that Voge was producing occupational turmoil, and that Voge required psychiatric labeling and fixing. Not one, however, could locate her alleged personality disorder except in extraclinical data, that is in the complaints registered against her by Naval command. Nearly a decade later, Tinelli is still angry and apparently feels used by the military hierarchy and admits that he can see how retaliation against Voge was the reason for her ouster from [NSC] and her transfer to Guam. Not one ever noted in their psychiatric opinions that Voge had nearly a decade (1972-1981) of service to the Navy without interpersonal or occupational turmoil prior to her rude awakening at [NSC]. Every one dated her alleged personality disorder to 1981-2 when the occupational/interpersonal difficulties became manifest. No one in 1982 asked "Why now, why not 5-10 years ago?" No one subsequent to 1982 asked, "Why did all of this become apparent after her tour at [NSC]?" This woman was the first female Flight Surgeon to graduate for the Navy. She should have been viewed as someone special, someone to be mentored and promoted as a model for all other females aspiring to Navy careers. Something went wrong and no one asked what that might have been. From my point of view, Admiral Warwick is a crucial informant to this process. It was under his command that Voge got her wake up call to the apparent harsh realities of Navy life, yet no psychiatrist, as part of a comprehensive evaluation, ever thought to include a statement from him as to the history of this woman as she toiled at his instruction.

Every graduate student in psychology is taught a formula $B = f(P \times E)$. Behavior is a function of the characteristics of a person in interaction with the characteristics of an environment or situation. To understand a person's behavior, you must understand the characteristics of the person, their manner of thinking, feeling, and tendencies

toward action, and you must also know something about the environmental conditions under which the behavior is manifest. In the Voge case, the Navy was apparently hell bent to understand Voge from the limited frame of reference of Psychiatry, and to affix a psychiatric label on her which would be a short cut to understanding her behavior, which was apparently a nuisance to the Navy. No one suggested that the E of the equation, the environment within which Voge was acting, needed also to be evaluated in order to understand her behavior. No one asked to review documents from the NSC, to talk with her superiors or peers about her when she was assigned to the NSC, or, in any other way, to open up the context within which she became a problem to the Navy rather than a prized asset. How is this oversight, not by one, but by every psychiatrist who was duty-bound to act as a physician in relationship to his patient, to be explained? Every psychiatrist, entrusted with her as a responsibility, apparently considered his client to be the U.S. Navy and not this human being. Mateczun typifies the prejudice of her evaluators when he "places little value" in the Turner report, apparently because Turner is the first evaluator to accept Voge's contextual claims at face value, that it just may be true that she has been systematically discredited by Naval command and that she may, in fact, simply be a "normal" person coping as best she can in a hostile environment.

This report is much longer than is probably typical for me to write. If there would be opportunity for deposition, the report would have been shorter with just the major points emphasized. I've laid out my thinking and judgment process in fine detail, however, so that you and the BCNR can follow the logic and critique as you see fit. I hope that this opinion is helpful, and that if its main premises are justified, the BCNR can find the courage and ingenuity to do what is right toward a person who deserved

better and who can still be an important officer within the Navy, serving them and her country proudly and well.

Sincerely,

/s/ Raymond Costello
Raymond M. Costello, Ph.D.
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10 October 1992

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Psychiatric Evaluation on:

Victoria (Vicki) Mae Voge, Cmdr. USN (MC)
SS# 040-58-0657, 49 Years old

On 28 September 1992, I spent four and a half hours with Dr. Voge, for purposes of psychiatric evaluation. Dr. Voge is a USN Flight Surgeon, one of the first two females selected for such training in the USN; though still in the Navy, currently she is serving with the Air Force at the USAF School of Aerospace Medicine, Brooks AFB, Texas on special assignment. Dr. Voge requested independent psychiatric evaluation in connection with her application to the Board of Correction of Naval Records. Formal evaluations in the USN had eventuated in a personality disorder diagnosis, which she viewed as punitively dictated by higher authority rather than as being clinically justified. Our agreement was that I would "call it as I see it," operating

from no presuppositions, and that her part of the contract was to be very honest and candid with me; I believe we each upheld our individual parts of the bargain. Beyond the interview, I spend several hours reviewing copies of the reports upon which the previous diagnoses were reportedly based. As far as I know, I had access to all pertinent materials; nothing was withheld.

Additionally, I enlisted the evaluative skills of Raymond W. Costello, Ph.D., Professor of Psychology at the Medical School of the University of Texas Health Science Center at San Antonio. I did so because in matters of this sort the finding must be very carefully documented if through is to prevail; "opinions" are not enough. Over the years I have worked with Dr. Costello on a number of cases involving both military and commercial aviation. He has always lived up to his reputation of impeccable scholarship, great intelligence, unquestioned impartiality and integrity. Our reports are to be separately prepared, without discussion prior to their dictation.

I did not know Dr. Voge nor any of her friends before the fact. She contacted me because I had many years experience in Aerospace Psychiatry and a solid reputation. My education included full graduate training in physiology, as well as completed residences in both Internal Medicine and Psychiatry at the Mayo Clinic, where I was offered a staff position. I am boarded in Psychiatry and am an Examiner for the American Board of Psychiatry and Neurology. I was for twenty-three years a USAF Flight Surgeon, spending the majority of that time working with flying personnel and their personnel and their families. As a flight surgeon psychiatrist I have worked at every level of the decision process, from primary evaluator to department chairman, as Chief of Psychiatry and Neurology at the USAF School of Aerospace Medicine for five years, from Deputy Com-

mand Surgeon to Military Consultant to the Surgeon General USAF in Psychiatry for the Northeast Region of Continental US & Europe. I have continued to be active in Aerospace Medicine to the present, having served in various psychiatric capacities for individual pilots, for the FAA and the Airline Pilot's Association, as well as having been NASA's consultant in psychiatry for manned space operations for over three decades. The latter endeavor absorbs ten to twenty percent of my professional time and has included many functions, including astronaut selection, psychiatric maintenance of astronauts and their families, evaluation of emotional difficulties, crew training and other pertinent mission inputs. As medical school faculty, for many years, I taught psychiatric diagnosis and clinical psychiatry to psychiatric residents at the University of Texas Medical School in San Antonio. I have also done full-time research for both the USAF and NASA in psychophysiology, high altitude protective equipment and stress tolerance prediction. Two tangible byproducts of this research were the first operationally practical mission-completion altitude suit, which became USAF and NATO standard, and the first practical external pacemaker-defibrillator, developed to protect test volunteers exposed to high levels of psychologic stress. I have been awarded a Special Aerospace Medicine Honor Citation from the American Medical Association for contributions to Aerospace Medicine. At the time of my retirement from the USAF, I was the prime thrust of my military command for promotion to general officer. The foregoing has the single purpose of indicating that I am a credible resource in psychiatry and aerospace medicine. I believe this is judicious also because my findings are in rather sharp disagreement with those diagnostic determinations of the USN which have had such a severely prejudicial impact upon the career of this medical officer, a major impact that threatens to continue into civilian life even after she leaves the

military.

A brief overview of some facets of Dr. Voge's pre-military history is of pertinence to the discussions. Dr. Voge was number two of a sibship of three and the first female of two. Her father was the dominant family member and favored the oldest child, his only son. Both father and brother were controlling and together stultified major elements of Vicki's independent growth. As an example, she wa not allowed to date during her father's lifetime, first dating at a graduate school level, while in medical school. Just as her brother was a favorite, an alter ego of father, her younger sister also received special attention because of serious illness as a child and the family perception of continuing fragility. It appears Vicki made several important decisions as a child, the continually of which have had an important bearing on her responses as an adult. The first of these centered on perfectionism and strong values as a way of gaining respect and of affirming self-worth. A bit later in her evolution, the need to please was added. Another still later development in her evolution was the reinforcement of a more personalized need for quality in her work and in her thinking process. Academic accomplishment was what had evoked smiles and approval from father. It is no surprise she graduated in the top two percent of her high school class, completed her college studies in only three years while still remaining on the Dean's List, and graduated from medical school in the top one percent. She passed her state board qualifications on her first try, has her M.PH. from Johns Hopkins, and is boarded in both Occupational Medicine and Aerospace Medicine. The intelligence, drive, and perfectionism implied in her academic record does not parallel suggestions of medical inadequacy that surfaced for the first time after she left the Naval Safety Center for what would normally have been considered less demanding duties on Guam.

Central to Dr. Voge's account is her assignment at the Naval Safety Center. She was assigned as an 04 to fill an 06 billet as Chief of the Aeromedical Division, another implication of previous superior performance. By her account, she was given a mandate by the Safety Center's Commander, Admiral Warwick, which required thorough and honest studies of mishaps in naval operational flying. Reportedly, the resulting investigations had the potential to embarrass her superiors in naval medical and operational areas because of documented revelations about the extent of chemical abuse and fatigue as factors in naval military accidents. Her admiral reportedly closely followed her work and protected her position when pressure was brought against Dr. Voge from above to have the accounts altered or muted in ways that could/would distort their accuracy by painting a much rosier picture than was Dr. Voge's reality. True to her basic personality structure, which carries with it a dedication to beliefs and value systems, she apparently reported truth as she saw it; as in her past at home, her performance pleased the primary authority figure in her professional life, Admiral Warwick. But eventually her protector left the scene.

It would be imperative to have a statement from Admiral Warwick were one available; unfortunately, he has died. Are accusations that Dr. Voge was "not a team player" accurate in the true sense of those words, or was it that she had perfectionistically followed to the letter the mandate of her superior officer in a crusade to force correction of long-standing abuses? Her basic structure lends itself to participation in the honorable campaign. If her involvement was born of a courageous attempt "to make a difference" for the good of the service, the accusation leveled against her that she was "not a team player" (a phrase with which I have become all too familiar in working with manipulators) can be translated to "you aren't doing what I want you to

do" and may have little relationship to the search for the truth. Unfortunately, the same basic personality structure that lends itself to the "power merchant"—manipulator approach also has strong tendencies to vengeance toward those they cannot bend to their will . . . and they also have long memories and little inclination toward forgiveness. I have considerable experience with the "power merchant" genre both as an area of research and in my clinical life; I have treated not only their victims, but also occasionally the promoter himself (or herself) after their manipulations have eventually left them "hoist on their own petard."

In all the USN reports I have read, I am struck by the apparent failure of the examiners openly to consider whether there could be real substance to Dr. Voge's sense of victimization at the hands of vindictive and powerful few. In my long experience with military, government, industrial and academic settings, I have seen such odious scenarios in action. The possibility of such a script in Dr. Voge's case cannot be dismissed out of hand by any conscientious investigator . . . yet it is not even mentioned as a possibility by her military evaluators. Why did she apparently function so well before her controversial assignment to the Naval Safety Center and yet so poorly in the subsequent possibly punitive assignment to Guam where she was labeled a personality disorder? By definition, personality disorders imply . . .

enduring patterns

of perceiving,
of relating to, and
of thinking about the environment and oneself. These patterns are expected to be

inflexible and maladaptive,
recognizable from youth, and
continuous through adult life, though painful learning experiences can at times mute their prominence.
Significant functional impairment and/or
major subjective distress result from these patterns.

Dr. Voge's pre-military and early milit[a]ry record strongly suggest superior performance rather than functional impairment. By her report, she was more closed and less insightful prior to her assignment from NSC to Guam, but there is nothing available historically to suggest she would be seen as pathologic. *Nor do any of the Navy evaluations I have seen document the pervasive long-term pathology necessary to make a personality disorder diagnosis.* I have checked with contacts at the USAF School of Aerospace Medicine, where Dr. Voge is currently on detached duty; she is reported to be functioning quite well on both occupational and interpersonal levels. Why would she now be functioning quite credibly, without evidence of those lifelong "enduring patterns" mentioned above?

Why does someone who has been functioning well suddenly turn sour, apparently in a major way? Her return to good function under Air Force auspices (or in the absence of USN duty) helps to eliminate some possibilities. But I searched in vain for the entertainment of a viable differential diagnosis by her evaluators. As someone who has taught for years the subtleties of clinical diagnosis to psychiatry residents, a number of possibilities come readily to mind. For instance, a perfectionist who also has a need to please is "hit where she lives" when she is told her work is inadequate, is downgraded to a position of lesser responsibility, banished to an undesirable remote assignment and treated as if she were an unacceptable person. Add to this

the perception that the authority structure she has been programmed to trust appears not only to have turned on her but also to have "poisoned the well" for subsequent reassignment. Duty and performance are big words for an individual like Dr. Voge, whose personality structure places special emphasis on belief and value systems. Did no one seriously consider that the patient might have been depressed when she arrived at Guam? The evaluations do not reflect that consideration. I would expect the probable dynamics at the time to be in the severe stress sequence for her personality structure, rather than in the sequence she might use for lesser stresses. Anger and righteousness in that case might well mask scare and hopelessness. Her interpersonal abilities would be at risk to decline, and she could become more withdrawn, less trusting, feel more peripheral, and be less able to "enjoy." She could become more litigatious at that point, and more "dug in" to hard positions. But it is to be remembered that this is an expected stress sequence for her personality type and does not per se warrant a personality disorder diagnosis. If I assume the Navy to be accurate in its allegations of serious malfunction by Dr. Voge on Guam (something I do not find adequately documented as being an unprovoked response on her part), I remain faced with other logical but unaddressed questions. For instance, did she truly refuse to acknowledge mistakes or was she convicted of the correctness of her decisions and declined to "back down" even under pressure? If I assume she was "hanging in" under pressures that would have driven less hardy souls out of the service, an associated depression would not be unlikely. *Behaviors or traits limited to episodes of illness, such as a depressive reaction, are specifically excluded in making a diagnosis of personality disorder.* A depressive response, whether viewed as an adjustment reaction or a major depressive episode, is far more defensible diagnosis for Dr. Voge than that of personality disorder. The JAG evaluation

precipitated by a request from Dr. Voge (Feb. 89), authored by F.K. Helmsin, Capt. USN, suggests Dr. Voge was not allowed "an even playing field" at Guam wherein she could re-establish her credibility. I failed to detect the nurturance one might hope would be expanded in an attempt to redeem or rehabilitate a previous brightly shining star.

What did I find in Dr. Voge? The basic personality foundation is that of a perfectionistic, task oriented, responsible, somewhat introverted individual from whom I would expect conscientiousness, dedication, and special gifts for observation and attention to detail. It is and apparent that, as she has evolved, she developed a softer, warm, sensitive side, with an increased potential for interpersonal openness. At this point one would expect a softening from dealing with the world belief and value systems to how also including the capacity for bringing in the world via feelings. Having originally accented recognition for work, thoughts and value systems as primary and a new appreciation for psychological needs, unconditional acceptance now became primary psychological needs, unconditional acceptance now became primary and a new appreciation for soothing sensory inputs would be expected to surface. This evolution is important because her first tier of needs, those centering on recognition for work and achievement, and her second tier, those related to unconditional acceptance as a person, were reportedly violated by her experience after her departure from the Naval Safety Center up until her detached duty with the USAF. There is evidence to suggest a third layering of evolution into a more personal striving to do things well . . . to be more perfect, if you will. This could only serve to reinforce the original perfectionistic foundation, a foundation that allowed for a more "equal opportunity" expectation of perfectionism in others as well as oneself. With the second perfectionist layer, the perfectionism is much more personally directed. When only normally

stressed, I would not expect to see the same level of righteous anger that is possible in her if severely distressed.

It would be helpful to know just where Dr. Voge was in her personality evaluation at the time of her assignment to Guam. If the feeling part of her personality was at the forefront at the time, under stress it would be possible for her to make some mistakes in work areas where she "knew better," but with her structure she would be more likely to acknowledge them than not. But if her second perfectionistic phase had at that point achieved pre-eminence, then it would be very unlikely for her to "mess up" at work. Under those circumstances, any malfunction would be much more likely to be in her personal life than in her professional. Irrespective of the phase predominance at the time, I would have anticipated the surface manifestations to differ from what has been implied in some of the supplied military documents.

Stress has a way of encouraging us to grow, or at least inviting us to re-evaluate our priorities and our behaviors if our backs are to the wall. Dr. Voge already shows a broader spectrum of evolution than most people will possess by the time they die. Currently there are indications of a fourth layer that is complimentary to the previous three and is important to the legal procedures currently underway. It is a layer that is resourceful, adaptive, and is unusually adept at getting things done . . . at making things happen. And at this level she will be more willing to take calculated risks to achieve goals. The authentic emotion usually found beneath the anger at this level is the need to be secure and accepted.

I have accentuated the personality structure because I believe it explains much of what has happened both in terms of her basic work orientation at NSC and of her

subsequent stress response. The persistent perfectionist in her had the capacity to follow her admiral's directives and to participate in a crusade that, while embarrassing to some officials at the moment, was seen as being ultimately in the service of her branch of the military. When she perceived herself as being punished for carrying out her duty and being treated as an identified "leper," she became depressed, with all the personality changes attendant thereto.

I find no support for allegations that she is now or ever has been a true personality disorder. I suspect Dr. Voge was evaluated by personnel who, at best, needed to sharpen their diagnostic skills, or who, at worst, allowed themselves to be manipulated by a powerful and vindictive few. Those evaluators who might fall in the latter group could quite logically have feared for their own positions if they did not fulfill the expectations of those who instigated the Voge evaluation.

Bottom line, diagnostically:

Axis	I:	no diagnosis warranted
Axis	II:	no diagnosis warranted
Axis	III:	history of a probable past major depressive episode which went untreated and which is now resolved.

POSTSCRIPT:

I do not expect Dr. Voge to be deterred in pursuit of correction of records in the Navy. She is a very intelligent woman who has as part of her basic character considerable persistence in pursuit of goals and a belief in the righteousness of her cause. She has developed a growing awareness of how to get things done. She knows that the personality disorder diagnosis can very significantly impact on her

employability as a physician. She is double boarded in Occupational and Aerospace Medicine, pursuits in which she is less likely to be self-employed than to work for others. Both for state licensure purposes and for employment purposes, a past diagnosis of personality disorder is poisonous.

I believe a serious injustice has been perpetrated and perpetuated, and that it cries out for correction in the name of simple justice. I would be very happy to supply Dr. Voge with several very potent names in American psychiatry and aerospace psychiatry should she feel it necessary to further clarify her diagnosis.

/s/ Terence F. McGuire, M.D.
Terence F. McGuire, M.D.

CHAPTER FOURTEEN

CREDENTIALS REVIEW PROCESS

* * *

14-11. *Fair Hearing Plan*

The following actions are considered adverse: suspending, limiting, or revoking privileges previously granted by the same activity.

a. Whenever adverse action is contemplated, the practitioner shall be afforded effective and timely notice of the right to the following procedural safeguards:

(1) Written notice that adverse action is contemplated and the reasons therefor

(2) A meaningful hearing before the credentials review committee at which time there must be an opportunity to be heard in person and present evidence

(3) A reasonable opportunity to present evidence and the testimony of witnesses and to confront any opposing witnesses

(4) If adverse action is recommended, a written decision stating the evidence relied on, the reasons for the recommendation, and the right to appear before the commanding officer before final

action is taken (see paragraph 14-11i)

(5) Availability of qualified and independent assistants in preparing the case

The foregoing enumeration of procedural rights to be afforded a practitioner is intended as general guidance for all adverse actions contemplated during the credentials review process. The practices of each command shall be adapted to provide for each of these rights.

b. Except as provided in paragraph 14-11j, a practitioner shall be given at least 10 days following his/her receipt of notice of the foregoing rights to file a written request for a hearing. Any such request shall be delivered to the commanding officer in person or by request shall be delivered to the commanding officer in person or by certified or registered mail. A practitioner who fails to request a hearing within the time and in the manner specified, waives any right such hearing and to any review of the matter to which he/she might otherwise be entitled. In such an event, the credentials review committee shall proceed to file such findings and report to the commanding officer as it deems appropriate under the circumstances.

c. Except as provided in paragraph 14-11j, a hearing shall be held not less than 15 nor more than 30 days from the date of the receipt for the hearing request. At least 7 days prior to the hearing, the commanding officer shall send the practitioner notice of the time, place, and date of the hearing.

d. The commanding officer shall ensure, to the extent practicable, that members of the credentials review committee hearing a particular case can be objective and independent in their deliberations. Any member with prior involvement in the matter being considered should normally be excused from taking part.

e. A hearing need not be conducted strictly according to the rule of law relating to the examination of witnesses or presentation of evidence. Any relevant matter upon which responsible persons customarily rely in the conduct of serious affairs (including, but: not limited to, the standards of professional practice as established by relevant professional literature) shall be admitted or accepted as a matter of official notice regardless of the admissibility of such evidence in a court of law. Each party shall be entitled to submit memoranda concerning any issue, and such memoranda shall be entitled become a part of the hearing record. The chairman of the credentials review committee may, but shall not be required to, order that oral evidence be taken only on oath or affirmation. If official notice is taken of any fact or scientific matter, the parties shall be so informed and those matters shall be noted in the hearing record.

f. The right to assistance in preparing the case does not imply an absolute right to the assistance of a representative at the hearing itself. Attorneys and other professionals who desire to represent a practitioner before the credentials review committee shall request permission to do so in writing prior to the commencement of the hearing. Permission may be granted by the sole discre-

tion of the committee and, if so granted, may be withdrawn at any time if the presence of the representative impedes the committee in performing its assigned duties.

g. A record of the hearing shall be kept that is of sufficient accuracy to ensure that an informed and valid judgment can be made by any group that may later be called upon to review the record and render a recommendation or decision in the matter. The credentials review committee may select any reasonable method to be used for making the record (e.g., court reporter, electronic recording unit, detailed transcription, or minutes of the proceedings). A practitioner who desires a method other than the one chosen by the committee may request same, but if the request is granted, the practitioner shall pay any added expense occasioned by the alternate method.

h. Requests for postponement of a hearing shall be granted by the credentials review committee only upon a showing of good cause and with the concurrence of the commanding officer. For the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation, the committee may recess the hearing and reconvene without additional notice. Upon conclusion of the presentation of evidence the hearing shall be closed, and the committee shall thereafter conduct its deliberations. Upon the conclusion of deliberations, the hearing shall be declared finally adjourned.

i. Within 15 days after final adjournment of the hearing, the committee shall make a written report of its findings and recommendations and shall

forward same, together with the hearing record and all other documentation considered by it, via the director of clinical services to the commanding officer for final action. If the report recommends adverse action, a copy of the report shall be provided to the practitioner coincident with its forwarding to the commanding officer. The practitioner shall have 5 working days following receipt of the report to file a request to appear at Mast to discuss the report with the commanding officer. Failure to request Mast within the time allowed shall constitute a waiver of any further review of the matter and acquiescence in any final action the commanding officer takes thereafter.

j. Notwithstanding any of the foregoing, a commanding officer is authorized to take summary action to suspend or limit the credentials of a practitioner when in his/her judgment the best interests of the patients so required and a delay in taking action might jeopardize the life of health of a patient. In such event the commanding officer may issue any suspension or limitation order necessary under the circumstances, but in no event shall the suspension or limitation exceed a period of 30 days. The credentials review committee shall hold a hearing in all cases of summary action, even though a practitioner may not have requested one. The suspension or limitation order itself shall be considered sufficient notice to the practitioner, and the 7-day period referred to in paragraph 14-11c shall be shortened to 3 days. The hearing shall be held and the committee's report written in the end of the suspension or limitation period. (This requirement may be waived by the commanding officer, but the suspension or limitation cannot exceed 30 days in

any event.) The right to request Mast after receipt of the committee's report is not affected by summary action.

k. Final action on the recommendation of the credentials review committee is the sole responsibility of the commanding officer and shall be based only on the report of the committee. The commanding officer may not take any action more severe than that recommended by the committee, but may take any lesser action deemed appropriate. Final action shall be documented in writing and delivered to the practitioner.

l. A credentials review committee report and commanding officer's final action that are rightfully accomplished in accordance with this chapter are not subject to withdrawal, alteration, or change except by special authorization by the Secretary of the Navy (through the Board for Correction of Naval Records).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Commander VICTORIA M. VOGE,
Medical Corps, U.S. Navy,

Plaintiff,

v.

Civil No.
89-1441-A

SECRETARY OF THE NAVY,

Defendant.

AMENDED NOTICE OF APPEAL

Notice is hereby given that plaintiff Victoria M. Voge hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order and Memorandum Opinion entered in this action on October 13, 1993 and the Order entered in this action on January 12, 1990. This Notice amends plaintiff's Notice of Appeal filed on October 19, 1993, and is filed within the appeal period prescribed by law.

Respectfully submitted,

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October 20, 1993

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

No. 94-1127

In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure of the court of appeals to discuss in its opinion an issue that was briefed by petitioner and that was fully addressed at oral argument constitutes a denial of her right to appeal on that issue.

2. Whether the court of appeals and the district court erred in failing to reverse the decision of the Board for Correction of Naval Records because of the Board's alleged failure to take into account certain evidence submitted by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unreported. The district court's order and oral decision dated January 12, 1990 (Pet. App. 7-8, 9-30) are unreported. The district court's post-remand order and memorandum dated October 13, 1993 (Pet. App. 31, 32-36) are also unreported. The opinions of the Board for Correction of Naval Records dated February 4, 1986 (Pet. App. 37-52), October 5, 1990 (Pet. App. 53-55), and March 4, 1993 (Pet. App. 56-58) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994. A petition for rehearing was denied on September 26, 1994. Pet. App. 6. The petition for a

writ of certiorari was filed on December 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an M.D., is an active-duty commander in the Navy Medical Corps. In 1981, she was assigned to the Naval Regional Medical Center (NRMC) in Guam as the Director of a branch clinic and was granted temporary clinical privileges as a flight surgeon. Those privileges were eventually revoked, however, and her application for permanent privileges denied, after doubts arose concerning her medical competence in the areas of clinical judgment and patient care. The lack of confidence in petitioner's professional abilities stemmed from a series of events, including her unorthodox suturing of a hand tendon injury; her cursory referral to the X-ray department of a patient who had multiple facial lacerations and trauma and was vomiting blood; her prescription for a child of an unusually high dose of a drug with potentially serious side effects; and her decision to permit enlisted male medical technicians to perform unsupervised gynecological pelvic examinations on active-duty and dependent females. CA JA 78, 103-105, 111, 113, 128.[1] Those incidents were reflected in three adverse fitness reports covering periods between October 31, 1981, and March 31, 1983. *Voge* v. *United States*, 844 F.2d 776, 777 (Fed. Cir.), cert. denied, 488 U.S. 941 (1988); CA JA 109-111, 126-128, 161.

During her first two months at the clinic in Guam, petitioner was questioned by her commanding officer and the director of clinical services about some of her

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[1] "CA JA" refers to the joint appendix filed in the court of appeals.

medical decisions in an attempt to discover and remedy petitioner's problems. CA JA 77. Although she responded to their questions with rational, logical explanations of her conduct, petitioner "avoid[ed] accepting any inappropriateness of her decisions," rationalizing that "any errors were due to interpersonal difficulties or disloyalty of her co-workers." *Ibid.* She indicated that she believed her difficulties were caused by discrimination by her commanding officer and by the Navy Bureau of Medicine (BUMED). Citing the adversarial nature of her relationship with BUMED during a previous assignment for which she evaluated flight surgeons and squadron safety, petitioner claimed that BUMED had informed the command at Guam that she was a troublemaker. *Ibid.*; *id.* at 85.

Those events led petitioner's commander to refer her for a psychiatric evaluation on April 12, 1982. CA JA 77-79. She was asked by Capt. Charner Bramlett to see Lt. Commander Eugene Tinelli, the staff psychiatrist, and petitioner did so. Dr. Tinelli drafted a preliminary medical synopsis containing his preliminary clinical impression that petitioner suffered from a "[p]aranoid personality, * * * manifested by oversuspiciousness, hypervigilance, and restricted affectivity." *Id.* at 79.[2] Dr. Tinelli recommended that petitioner receive a complete psychiatric evaluation by the psychiatric department of the NRMC in San Diego. *Ibid.*

Petitioner subsequently spent a month at NRMC-San Diego under observation. Although the NRMC's

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[2] Personality traits are an individual's long-term patterns of perceiving and relating to environment and self. When such traits are inflexible and maladaptive and cause significant functional impairment or great internal distress, they are viewed as personality disorders. Pet. App. 65-66.

primary diagnosis was "[n]o diagnosis," and petitioner was found "psychiatrically fit for return to full duty," the two-member board of psychiatrists noted that she "has some hysteroid and obsessive-compulsive character traits which tend to get her into trouble at times of crisis." CA JA 86. The doctors at NRMC characterized petitioner's major area of difficulty as "extreme indecisiveness," and noted that, "when stressed, she tends to lose her objectivity and her hysteroid traits become prominent." *Ibid.* The NRMC board gave petitioner an opportunity to comment on its decision (*id.* at 87), and her comments, along with the psychiatric evaluation, are part of the administrative record. *Id.* at 88-93.

2. In 1982, petitioner sought additional special pay (ASP), extra remuneration that a medical officer normally receives after agreeing to remain on active duty for at least one additional year. See 37 U.S.C. 302(c)(1). Based on the denial of petitioner's clinical privileges and the adverse fitness reports, petitioner's commanding officer recommended that her request for ASP be denied for the period from July 1, 1982, until June 30, 1983. A review board approved that recommendation, and further determined that ASP should also be denied for the period from July 1, 1983, until June 30, 1985. In addition, petitioner was passed over for promotion to captain in 1986. *Voge*, 844 F.2d at 777-778.

3. In 1985, petitioner sought relief from the Board for Correction of Naval Records (BCNR) under 10 U.S.C. 1552. Petitioner requested, among other things, that her records be corrected (1) to delete references to actions taken to revoke and deny her clinical privileges; (2) to show favorable action on her request for permanent clinical privileges; (3) to delete all references to the psychiatric evaluations by Dr. Tinelli and by the NRMC in San Diego; (4) to remove adverse fitness reports; (5) to

show that she was entitled to ASP; and (6) to order her to be considered by a special promotion board for promotion to captain. Pet. App. 37-39.

In a decision dated February 4, 1986, the BCNR recommended correction of portions of two of the adverse fitness reports, but concluded that the reports were otherwise not "substantially erroneous or unfair" and that petitioner's selection for promotion would have been "unlikely" even with the corrections the BCNR made to her records. Pet. App. 48-50. The BCNR found that petitioner had been "treated fairly" in the decredentialing process. *Id.* at 49. Based on the BCNR's recommendation, the Secretary of the Navy approved the deletion of specific references to pending administrative action in one fitness report and the removal of another fitness report, and denied petitioner's other requests for relief. *Voge*, 844 F.2d at 778.

Petitioner then filed suit in the Claims Court, seeking essentially the same relief she had requested from the BCNR. Based on procedural errors in the denial of ASP to petitioner, the United States did not oppose the Claims Court's issuance of a judgment for three years' worth of retroactive ASP in the amount of $30,000.[3] The United States moved for dismissal of petitioner's remaining claims on the ground that they were beyond the jurisdiction of the Claims Court.

That court granted judgment for petitioner in the amount of $30,000, and held that it did have jurisdiction to

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[3] The BCNR had erroneously considered information post-dating the denial of ASP and, for two of the three years' denial, a required recommendation from petitioner's commanding officer regarding denial of ASP had not been issued. *Voge*, 844 F.2d at 778; see also U.S. Br. in Opp. at 3 n.2, *Voge* v. *United States*, No. 88-81.

review petitioner's service records as part of its review of the denial of ASP. After reviewing the administrative record, however, the court found no error in the preparation or composition of the fitness reports, and it declined to second-guess the judgments of petitioner's superiors as to her medical and military competence, as reflected in the fitness reports and the denial of clinical privileges. The court also held that petitioner had no right to reconsideration of her nonselection for promotion, and denied petitioner's requested relief. *Voge* v. *United States*, 11 Cl. Ct. 510 (1987).

The Federal Circuit affirmed the judgment for ASP, but vacated that part of the Claims Court's decision that purported to review petitioner's military records as beyond that court's jurisdiction. *Voge* v. *United States*, 844 F.2d 776 (1988). This Court denied certiorari. 488 U.S. 941 (1988).

4. Petitioner then filed suit in district court against the Secretary of the Navy seeking review of the BCNR's February 4, 1986, decision pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* On January 12, 1990, the district court denied both the Navy's motion for summary judgment and its motion to dismiss. Pet. App. 7-8. The court remanded the case to the Secretary of the Navy so that the BCNR could reconsider the issues raised in a May 24, 1985, statement submitted by petitioner. *Ibid.*; see CA JA 211. In pertinent part, that statement claimed that Dr. Tinelli had told petitioner in August, 1982, that he gave her a psychiatric diagnosis because he had been ordered to do so by Capt. Bramlett and that Capt. Bramlett had been ordered to do so by

BUMED. *Ibid.*[4] The district court explicitly rejected petitioner's assertion that the Navy violated her due process rights by failing to adhere to its own Fair Hearing Plan.

On remand, the BCNR again denied relief in a decision dated October 5, 1990. Pet. App. 53-55. The BCNR specifically was unable to find that Dr. Tinelli's report was the result of "coercion." *Id.* at 54. Petitioner asked the BCNR to reconsider its decision, and, on March 4, 1993, the BCNR again denied relief, finding that the evidence submitted was insufficient to establish that material error or injustice had occurred. *Id.* at 56-58. Before denying relief, the Board sought and considered an advisory opinion by Capt. John M. Mateczun, a Navy Specialty Advisor for Psychiatry, evaluating Dr. Tinelli's diagnosis. *Id.* at 59. The BCNR also considered petitioner's application, together with all materials submitted in support thereof, and petitioner's entire file to date.[5]

Once again, petitioner appealed the BCNR's decision to the district court, and the district court granted summary judgment for the Navy. Pet. App. 31, 32-36. The district court concluded that Dr. Tinelli's 1982 psychiatric report was not command influenced, that the BCNR properly reviewed petitioner's allegations on

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[4] The district court referred to the issue raised in the May 24 statement as the command influence issue. For convenience and consistency, we use that term as well.

[5] Among the materials submitted by petitioner and considered by the Board in its March 4, 1993, decision were two psychiatric evaluations performed in 1992 by Drs. Costello and McGuire, and a letter from Dr. Tinelli, who was no longer in the Navy, dated October 30, 1990. Dr. Tinelli, like Capt. Bramlett, unequivocally denied any commend influence. Pet. App. 4, 56; Pet. 5-8.

remand, and that it did not act arbitrarily or capriciously in denying relief to petitioner. *Id.* at 33-34.

The court of appeals affirmed (Pet. App. 1-7), concluding that "the BCNR's decision was not arbitrary and capricious." *Id.* at 5.[6]

ARGUMENT

1. Petitioner argues that the court of appeals improperly refused to review the portion of the district court's 1990 decision rejecting petitioner's claim that the Navy violated its own Fair Hearing Plan in decredentialing petitioner on Guam. Pet. 11-12.[7] Petitioner asks this Court to determine (Pet. I) whether her failure to appeal the district court's 1990 remand order constituted a waiver of all issues except those involved in the remand. The decredentialing issue, however, was presented to the court of appeals in petitioner's briefs and oral argument, and the court of appeals appears to have considered it. The waiver question presented by petitioner is therefore not presented by this case.

The Navy's brief in the court of appeals suggested (at 13 n.9) that that court should decline to address issues other than those involved in the 1990 remand. See Pet. 9-10. However, petitioner's reply brief contended that the Fair Hearing Plan/decredentialing issue was properly before the court of appeals, see Pet. 10, and the

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[6] The court of appeals noted, with regard to the command influence issue, that Capt. Bramlett denied the allegation that he had been ordered to refer petitioner for a psychiatric evaluation and that Dr. Tinelli denied the allegation that he was ordered to make a particular diagnosis of petitioner. Pet. App. 4.

[7] The Board found that petitioner had been treated fairly in the decredentialing process (Pet. App. 49), and the district court found that petitioner had been given the process that was due her. Pet. App. 12, 29.

government conceded at oral argument that "[t]he Fair Hearing Plan[,] or the due process claim, * * * [is] properly before the Court." Tr. 19.[8] The Fair Hearing Plan/decredentialing issue was, moreover, fully explored by both counsel at oral argument and was the subject of several questions by the court of appeals. See Tr. 4-6, 27-31. And although the court of appeals did not address the Fair Hearing Plan/decredentialing issue in its opinion, the opinion affirmatively indicates that the court did not confine its review to the command influence issue: "The question on appeal is whether the trial court properly held that the decision of the BCNR was not arbitrary, capricious, or unsupported by substantial evidence *and* that the decision complied with its January 1990 [remand] order to review and resolve the issues raised in [petitioner's] letter dated May 24, 1985." Pet. App. 3 (emphasis added).

2. On the merits, petitioner claims that the court of appeals improperly failed to insist that the BCNR "render a rational account of the *entire* record." Pet. 14. Petitioner asserts that that failure violated the command of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951), that the agency base its decision on the record as a whole and that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

"[I]n an effort to prove that [petitioner] did not suffer from any mental illness," Pet. 5, petitioner submitted psychiatric evaluations performed in 1992 to the BCNR before the BCNR's March 4, 1993, decision. CA JA 422-427; see *id.* at 401-411, 415-421. In that decision, the BCNR explicitly stated that it considered petitioner's

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[8] "Tr." refers to the transcript of the May 5, 1994, oral argument held in the Fourth Circuit.

application, "together with all material submitted in support thereof." Pet. App. 56. Petitioner's contention that the BCNR "totally disregarded [the psychiatric reports] in its reconsideration on remand" (Pet. 8) is, consequently, inaccurate.

In addition, the psychiatric evaluations submitted by petitioner were not relevant to the command influence issue before the BCNR pursuant to the district court's remand order. Nor did they detract from the Board's repeated conclusions that the Navy followed proper procedures, and that Dr. Tinelli's evaluation was properly performed and valid. The district court expressly found that the BCNR's failure to address the hindsight opinions expressed in the psychiatric evaluations "do not alter the court's view as to the arbitrary or capricious nature of the Board's decision." Pet. App. 34.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, *Petitioner*,

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. By scrambling the sequence of events, the Secretary conveys a distorted picture of the facts. Specifically, he contends (2) that petitioner lost her clinical privileges "after doubts arose concerning her medical competence in the areas of clinical judgment and patient care," and only later (3) mentions that Dr. Voge was referred for a psychiatric examination which resulted in her being provisionally diagnosed as paranoid. The circumstances were actually quite different. Dr. Voge's commander on Guam caused her to be psychiatrically evaluated *before* steps were taken to revoke her privileges. The decredentialing proceeding, which violated the Navy's *Fair Hearing Plan*, was only commenced after Dr. Voge, having been "medevaced" to a Naval Hospital in California on the basis of the provisional diagnosis of paranoia, was found fit for full duty. This frustrated the command's attempt to get rid of her on

psychiatric grounds. The sequence of events—first, an unsuccessful effort to obtain a psychiatric diagnosis, and only then, pursuit of an illegal decredentialing—is key.

2. The petition noted (10) that the Secretary's brief to the Court of Appeals took the position that the *Fair Hearing Plan* issue was not properly before it. The Secretary claims (8), however, that the Court of Appeals "appears to have considered" that issue because it was presented in Dr. Voge's briefs and oral argument below. He also points (9) to a sentence from the Fourth Circuit oral argument transcript and another from the Court of Appeals decision. These bits and pieces do not furnish the assurance to which Dr. Voge and this Court are entitled that her due process issue was in fact considered.

a. As appellee below, the Secretary filed a single brief. That brief incorrectly argued that the Court of Appeals was at liberty to ignore the *Fair Hearing Plan* issue because Judge Bryan did not address it in his 1993 ruling, as it had not been included in his 1990 remand order. At no time did the Secretary confess error or seek to correct, withdraw or disavow this or any other part of his brief, although the language he reproduces from the oral argument transcript is inconsistent with it. Perhaps the Secretary has come to realize the error in his brief, and perhaps he would agree that if the Court of Appeals did act in accordance with the approach suggested in that brief, the first Question Presented is raised. The problem for both parties is that it is not possible to determine from the Fourth Circuit's decision whether that court treated agency counsel's oral argument as having abandoned the position taken in the Secretary's brief.

b. This in turn raises a further ambiguity, for the decision below fails to disclose the Fourth Circuit's position on whether, as a threshold matter, the *Fair Hearing Plan* issue was properly before it, and further, if it was, whether the *Plan* had been violated. Given the complete silence of

the decision on either issue, one can only speculate as to the logical path the Court of Appeals took. Certainly, the absence of any reference to *Service v. Dulles*, 354 U.S. 363 (1957), strongly suggests that it felt itself under no duty to determine—and did not decide—whether the Navy impermissibly violated its own regulation. The opinion below is completely consistent with the position the Secretary took in his brief and leaves no basis for concluding that the Court of Appeals disagreed with that position or adopted the position agency counsel ultimately took at oral argument with regard to the merits of the *Fair Hearing Plan* issue. 4th Cir. Tr. 27-31.

c. In an effort to circumvent the problem created by the Court of Appeals' silence, the Secretary claims (9) that one particular sentence in the opinion "affirmatively indicates that the court did not confine its review to the command influence issue" which Judge Bryan had remanded. The point is without merit because, as the Secretary's counsel advised the Court of Appeals, there were *five* issues in the case on appeal. 4th Cir. Tr. 19. Hence, to say, based on the emphasis-added "*and*" that the part of the sentence in question that refers to matters other than the 1990 remand must have been intended to refer to the *Fair Hearing Plan* is fallacious.

d. Finally, the Secretary ignores the fact that Dr. Voge's petition for rehearing and suggestion for rehearing *en banc* specifically drew the Court of Appeals' attention to its failure to address the *Fair Hearing Plan* issue. If the Court of Appeals had in fact addressed it, the panel could easily have said so in its order denying rehearing. Instead, rehearing was denied without explanation. App. 6. This sequence of events and unexplained judicial action in a court whose appellate jurisdiction is mandatory rather than discretionary provides no assurance that this important issue has been addressed. Such a matter should not be left to speculation.

e. Whether Dr. Voge's right to appellate review was improperly truncated should not be left to speculation. The Court of Appeals had the last clear chance to explain why it ruled as it did, but failed to take it. This Court should dispense with full briefing and argument and direct the Court of Appeals either to address Dr. Voge's *Service v. Dulles* issue or explain why that issue need not be addressed.

3. A similar obscurity pervades the Court of Appeals' treatment of Dr. Voge's *Universal Camera* issue. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Secretary argues (10) that, by claiming that it had considered all of the materials that Dr. Voge submitted in support of her application, the Board for Correction of Naval Records satisfied the APA's requirement to consider the whole record. This claim is an "appeal to unreality," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting), and cannot be taken seriously. The BCNR refused to correct Dr. Voge's medical records substantially for the reasons stated by its consultant, Captain Mateczun. App. 57. But the BCNR never furnished him the powerful independent psychiatric evaluations which she had filed. App. 70-93, 94-105.* It has obviously *never* taken those evaluations into account.

It was not for the Court of Appeals to do the BCNR's work, and even if it were, the decision below, by ignoring the evidence of which the BCNR kept Captain Mateczun in ignorance, fails to render a rational account of the agency record. The Fourth Circuit had a duty to

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* The BCNR also referred to an advisory opinion from an office in the Bureau of Naval Personnel. App. 57. That office was concerned only with Dr. Voge's fitness reports. Like Captain Mateczun, it was not furnished with and did not address the independent psychiatric evaluations she submitted.

remand with instructions to the BCNR to consider the independent psychiatric evaluations and, if relief was to be denied, explain why they did not dictate changes in Dr. Voge's record. It failed to do so.

Conclusion

For the foregoing reasons and those previously stated, certiorari should be granted. The Court may wish to grant, vacate and remand to afford the Court of Appeals an opportunity to clarify its action in this case.

Respectfully submitted.

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